AND DUTY

OF

EXECUTORS.

OR

A TREATISE OF

WILS and EXECUTORS,

directed to Testators in the choice of their Executors, and Contrivance of their Wils.

With direction for Executors in the Execution of of their Office, according to the Law; and for Creditors in the recovery of their Debts.

With divers other particulars, very usefull and profitable for all persons, be they either Executors, Creditors or Debtors.

Compiled out of the Body of the Common Law, by THOMAS WENTWORTH, late Bencher of *Lincoln's* Inn.

The Fourth Edition, Corrected and Amended.

LONDON,

Printed for *W. Lee* and *D. Pakeman*, at their Shops at the Twin head & Rainbow in Fleetstreet. 1656.

Tx
W478
1684

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The Fourth Edition, Corrected and Augmented.

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The Preface.

Amidst the Readers of these Discourses; some not yet unfriendly may aske perhaps, *Quorsum hæc*, or *Quorsum sic?* Why have we a Treatise and Discourse legal; or why in English, and not rather in the Law language? To whom, yea, also to others, perhaps lesse inquisitive, it will be, as I think, a thing not unpleasing to heare some reason rendred, why I have set my head and hands to this worke so little in use with those of our profession, why also in English rather than in the language, wherein our volums of Law are for the most part, and well high wholly written.

First, for the matter, *viz.* my thus commenting or making a

1. I have long and strongly conceived that the more Nobles, Gentlemen and others, shall be acquainted with the Law of the Land, and the justnesse, equity, prudence and providence thereof, the more they will love it and affect it; *Ignoti nulla cupido*, the want of knowledge of it causeth the leanesse of love to it. Therefore to bring Nobles and Gentlemen into acquaintance with the Law, is a meanes as well to advance it in their estimation as to advantage them by it.

2. I have long thought that we who are the Professors of our Law, have beene more wanting to it, than the Civillians and Canonists to theirs; who have written very many volumes: *Spartam quam nactus es, hanc exorna*, hath been said of old, and should be assayed anew.

3. More wanting than others before us of our owne Profession, have we also been, and think: yet as of old

Britton, *Glanvill*, *Bracton*, besides not printed, *Fleta* and *Ingham*, did lead the way, so since Master *Littleton*, and more lately, Sir *Germin Perkins*, *Fitzherbert*, *Stanford*, *Crompton*, *Lambert*, *Kitching*, Sir *Henry Finch*, *Dalton*, have troden this path; so as it cannot be taxed with novelty or singularity. I mention not relaters or reporters of Judgments and resolutions, nor meere abridgers, nor Author of Bookes of Entries, expressing formes of Declarations and Pleadings, &c. Because these have trodden another, though for the Students and Professors of the Law, a very profitable path.

The tax and increpation of our late learned, and judicious Soveraigne, upon us the Professors of the English Law, as being wholly in effect addicted to our owne private gaine and advantage, with neglect of the publike, had some strong operation upon me, howsoever upon others, 4 King *James* in his Preface to his Booke against Tobacco.

on works, specially in Summer vacations, upon divers particular subjects, whereof this is one and the first borne.

5. To this I may adde the Grownes expectation of somewhat legal to bee published and set forth from time to time, as appeares by the special Patents successively granted, and renewed for the sole Printing of Bookes of Law. There is one such in force at this present, and another long hath been in remainder and expectancie to take effect upon the expiration thereof.

6. And now to adjoyne *Sic* to *Hæc*, *viz.* the reason of my English writing to that of my writing upon a Law theme. First, receive the said late Kings judgement touching both, expressed in one of his Speeches printed March 1609. Thus I wish, saith he, the Law written in our vulgar language; but now it is in an old mixt and corrupt language, only understood by Lawyers, whereas every subject ought to

Note. I n-

understand the Law under which he lives, &c.

Herein, *Andrew Horne*, one sometime of our Profession, agreeth with the said late King, saying, *Abusio est que les leges ovesque leur enchesons, ne soient sceus & conus del tents*: It is an abuse, saith he, that the Lawes with their grounds be not known by all. *Ergo*, to be in a tongue understood by all. 7 In his Mirrour of Justice.

More plainely and fully doth that our both well learned and well descended Saint *German*, sing in consort with our said late scientious King. For hee first brings in the Doctor of Divinitie, saying, that hence-forth he will take more paines than before he had done, to know the Lawes of England; for that knowledge is *Multùm necessaria & Clericis & Laicis, imo omnibus in hoc regno commorantibus, etiam in foro conscientiæ.* And this being in his first Book written in Latin; after writing his second Book in English, 8 Lib. 1. c. 24.

reason, viz. To the end that it might be understood by all.

Which of us hath not heard it objected, that we the professors of the Law seeke to hide and secure the knowledge thereof under this darke and distasted language, wherein the Law is for the most part written; not that I hold it any just excuse for the nescience or negligence of any, that our books are not in English. Since first, it were easie for any diligent and intelligent man, specially if acquainted with the right French language, to understand our broken or bracklish French in a few dayes. Secondly, there be both Statutes and some other law-bookes in English, which are neglected by the most. Thirdly, though care hath been in Parliament in *Edward* the third his time, that Lawyers should plead, that is, argue & debate causes in English, which was often desired by the Nobles and Commons, till at last assented

Commissions of Purveyours should be in English, to the end that all subjects from or of whom they would take, might both see them to be persons authorised, and so also in what manner they are directed to use their Authority, according to the Princes pious and princely care that his subjects should not be abused by his Officers: Yet for this Affaire, of having all the Law-volumes speake English, I have not heard nor read of any desire or endeavour in Parliament. Fourthly, If the Annals and Reports were in English, they are so replete with Debates about formes of Writs, Returnes, Pleadings, Essoygnes, Imparlances, Protections, Vouchers, Ayd-priors, and Counterpleas of both, and the like, as would easily distaste and discourage any not intending to professe and practise the Law, from perusing much in them, or passing through them.

them. This therfore, as I think, would not much effect the expressed desire.

10 The thing (in my judgment) fit and fruitful to produce that good effect, would be to have extracts of materials of the Law, and that not without some good choice and selection, composed in way of Discourse, or tractate expository, and that in English.

11 I cannot well see or comprehend how any one legall part or Theme may be more usefull to and for the generality of men, and consequently more generally expetible and wished for, then the Office of Executors. For who almost is there, who either is not, or may not be an Executor or Administrator, or at least hath not, or may not have to do with them, either to receive from them, or to pay to them debts or legacies? Or who is there above *Forma pauperis*, that may not be a testator, or Will-maker, to the guidance of whom, even in the choice of his executors, and contri-

vance

vance of his Will, it cannot but be material to know the office and duty, the right and interest, the power and authority of Executors, yea, of each one Executor where there be divers; yea, to know who may be made an Executor, who not; who can make one, who not; how he may be ſtiſled, generally or ſpecially; what ſhall come to him, what cannot be given from him; yea, what goods or chattels ſhall goe from him, though not given from him. Beſides the knowledge for thoſe others neceſſary of the ſafeſt wards or locks for Executors. Their *Scilla* and *Charibdis*, and the beſt advantage for creditors, &c. towards or againſt them. To me, conſidering what parts of Law were moſt behoveful to be communicated to all willing Readers, none appeared which could challenge of this the precedence, and therefore I gave it the firſt and leading place. Thus mine owne thoughts. But how farre this

diſ-

discourse may be profitable to any, and to how many, *alienum sit judicium.* How many know no more of these, than of the way of a ship upon the Sea?

12 Lastly, these are not intended for the Learned of our profession, who have drawn or can draw out of the same fountaine which I did, and so need not my help; but for their sakes who are not professors of the Law: yet so as if any young Students may in any part receive fruit by my labour, I shall not grudge or repine at their so doing. *Bonum quo communius, eo melius.*

The end of the Preface.

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THE

THE OFFICE OF AN EXECUTOR.

THE things conſiderable touching Executors, may all, in effect, be reduced to theſe 3 heads, *viz.* *Introduction.*

1. Their *Being*.
2. Their *Having*.
3. Their *Doing*.

By the firſt I intend their Creation & conſtitution, with the incidents thereto. By the ſecond, their intereſt, fruition, or poſſeſſion. By the third, their managing and execution of their Office. This laſt was and is the thing principally

in my intention, and chief aim of this discourse, but necessarily it must have some *Ingredients*, some *Concomitants*, and some *Consequents*; as he that travelleth from *London* to *York* to speak with *J. S.* must needs passe by and through other Towns and Villages, and speak with divers other persons in his journey and returne. To come first to the first; therein wee will consider these six things.

CHAP. I.

1. *WHether an Executor and a Will be such relatives, that one cannot be without the other; and therin of the several kinds of Wils.*
2. *How and in what words an Executor may be made and created.*
3. *How he may be in special manner different from the general, fashioned, limited or qualified.*
4. *Who may make, or be made an Executor, who not.*
5. *What one may give or bequeath by Will, what not.*

6. *How*

6. *How a Will or Executor once made, may be unmade, and what ſhall amount thereto, viz. a Revocation total or partial; what to new publication.*

Of the Relation between a Will and an Executor.

AS to the firſt, the very name of Executor purporteth in general one to execute ſomewhat, or to whom the execution of ſomewhat is committed or recommended: In one particular therefore, an Executor of a Will muſt needs be ſuch a one to whom the execution and performance of an other mans Will after his death is commended or committed. Or who is conſtituted or authorized by the Wil-maker to do him that friendly office. Hence it followeth neceſſarily, that a Will is the only Bed where an Executor can be begotten or conceived; for where

no Will is, there can be no Executor: this is so conspicuous and evident to every low capacity, that it needs no proof or illustration. On the other side though much may be written in the name of a Will, many Legacies bequeathed, and many things appointed to be done, yet if no Executor be named, there is no Will for these two be so relative and reciprocall, as that one cannot bee without the other; if no Wil, no Executor; no Executor, no Wil: yet here are two Cautions to be affixed: 1. That a man's Mind, Wil, and Intent, touching the disposition of his goods, being declared, although for want of naming an Executor he die Intestate, so as Administration is to be committed, yet for that here is not only an inchoation, or inception of a Testament: but so farre a progression therein, as *testatio mentis*, that is, the manifestation of the mind of the party deceased, and owner of goods; therefore this mind and intention of the intestate being notified and made known to the Judge, who is to commit Administration is usually annexed (as I take it) to the letters of Administration; and meet so to be, for a direction, for and

Plow. Com. 185 in Wood. & Darcies case, so expressly said.

Testamentum quasi testatio mentis.

the Adminiſtrator; as well as to the Wil fully & perfectly made, but refuſed to be proved by the Executor, which is uſual. Another Caution is, where a man ſeized of land in Fee ſimple, diſpoſeth the ſame, or part therof, by his Wil in writing; this ſtandeth good for the whole or part, according to the difference of the tenure, although noexecutor be named: So as the party dieth inteſtate, and Adminiſtration is to be committed as touching his goods, and yet hath a Wil as touching his lands. This may ſeem ſtrange, but the reaſon thereof is an act of Parliament, inabling to diſpoſe of Land by Wil in writing: and for that Land is not properly teſtamentary, neither hath the Executor (if any be) any thing to do or intermedle therewith, and therefore is the making or not making of an Executor, nothing pertinent to the validity, or invalidity of this deviſe or diſpoſition of Lands by Wil. So as though where there is not *Teſtatio mentis*, there is not *Teſtamentum*; yet may there be the firſt without the later. Having now ſeen that bequeſts of Legacies, without making of Executors doth not amount to a Wil: Let us now conſider whether the ſole making of Executors in the name of a Wil,

without giving any Legacy, or appointing any thing to be done by Executors. Whether I say, this be, or amount unto a Will, or not, since here, upon the matter, nothing is willed, and consequently nothing rests to be executed by the Executors, whose office is, as hath been said, to execute the mind, will, and intent of their Testator; and, *Ubi non est testatio mentis, non est Testamentum*, saith the Canonists; for answer hereunto, confessing that indeed to be the office of an Executor; I yet conceive confidently that in the case above put, there is a good Will, and as a Will it is to be proved and approved, for these reasons. First, for that the main part, and principal part of an Executors office, and that which concerns the soul of a Testator (as our books speak) is the paiment of his debts; now who knows not that the very making of an Executor is the constituting of such a person who is to pay all debts? and for that cause and end is principally to have and enjoy all the goods and chattels of the testators, and all sums of money to him owing: so as the naming of *A* and *B.* executors, is by implication a gift or donation unto them of all the goods

Sum. Silv. fol. 32 b.

chattels, credits and perſonal eſtate of the teſtator, and the laying upon them an Obligation to pay all his debts, and making them ſubject to every mans action for the ſame. And if the Law ſpeak thus much ſince, *Quod neceſſariè ſubintelligitur non deeſt*, what need then the party expreſſe it in his Will? If he had willed more then this, as to have given this or that in way of Legacy, it had been needful for him ſo to have ſet down in his will, but there is no meer neceſſity that every man ſhould give Legacies in his Will, the eſtates of many will not do more then pay their debts, nor oftentimes do ſo much, ſo as if they ſhould give any Legacies, it muſt be a dead, and a void gift. And ſuppoſe a man hath much more, and intendeth all to his wife, brother or ſiſter, or other friend, his debts being by ſuch perſons paid, ſince the very making of the party Executor without any more, amounteth to thus much, and effecteth this, what needeth then more words? *Fruſtra fit per plura quod fieri poteſt per pauciora*; as we often ſpeak touching legall paſſages, it is needleſſe to write four lines, where two be ſufficient. Nor is *teſtatio*

mentis here wanting, ſince the Teſtator hath made known; who ſhal have the Adminiſtration of his goods for payment of his debts: and it is to be preſumed, he had no more ſpecial Will, ſince he did not declare more, and left his Executors further to have and to doe, *prout lex poſtulat*: And who can ſay, here is nothing to execute? Is the ſuing for, and collecting of Debts due to the Teſtator, and paying of Debts by him, nothing? Nay, it is *in hoc negotio*, the *unum neceſſarium*. Beſides, the making of an Executor is a deſignment of a perſon to be the teſtors Aſſigne, to whom, and by whom divers things may bee feaſible by vertue of Covenants, Bonds, or other Aſſurances, as after, where we come to ſhew how the Executor repreſents the perſon of the Teſtator, will appear: Alſo of one, who, as our books often ſpeak, is to diſpoſe the Teſtators goods for the beſt advantage of his Soul; but in ſtead of that, (ſince as the tree falleth ſo it will lie or reſt) I wil ſay, as is moſt for the honour and reputation of the Teſtator.

Of the kinds of Wills

NOw Wills are of two kinds, or may be two waies made, *viz.* Either by writing, or nuncupative, that is, by words not put in writing during the Testators life; for after the Testators death, this verball Will must be reduced to writing, and have the Seale of the Ordinary or Judge spiritual thereto affixed; and then it is as effectual, and of as good validity as if it had been in writing in the testators life-time; and so doth the Common-Law allow and approve thereof.

4 Hen. 6. 10. E. 4. 1. If it be written and brought to, & approved by the Testator in his life, it is a will in writing.

14 H 6. 5. vid. 5. H. 5. 1. M 15. & 16 Eliz.

But I advise all to make Wils by writing, & not to leave them to the doubtful fidelity, or slippery memory of witnesses. For as of Leases paroll hath been said, That they be Leases perjured, or of perjury: so of Wils parol may be feared. Besides, many times a man doth speak and declare this or that part of his Wil, which his wife, child, or friend-disswading, he letteth that purpose and part of Will to fall, and departs from it: yet Witnesses wishing it to stand, will perhaps affirm it as part of the Will. As for a Wil-gift, and disposition of land of inheritance, if it be not fully written

written before the death of the Teſtator, or done ſo farre (at leaſt) as concernes the diſpoſition of lands, it cannot be for that part made good by reducing it to writing after his death. As for goods and Chattels, it may: yet if it be written before the death of the Teſtator, if it be never brought to him, or read to him after the writing thereof, it is good enough; and that not only for Land, as the caſe reſolved in K. *Ed.* 6. his time was, but alſo for goods and Chattels, ſo as there be an Executor named: But whether ſhall we ſay this is a Will nuncupative or in writing? And ſurely, I think that this is a Wil in writing, and not only verball, though it want ſubſcribing? for we know that many cannot write their names, but only marks, and what is that? Nay, ſuppoſe one want hands, and cannot write ſo much as his name, yet doubtleſſe this man may make a Will in writing, it being written by his direction, as his Will which he dictated; nor is the ſubſcribing of the name of the maker any eſſential part of a deed, much leſſe of a Will, which needs not ſealing, as a Deed doth. Now put we the caſe on the other ſide, that many bequeſts of

6. Ed. D. 32.

Legs

Legacies be named in a Will, and many things expressed to be done, and no Executor is named in the writing, only by word of mouth *A* and *B.* be named Executors: This I thinke confidently is no Will in writing, but nuncupative only, for that one essential part of the Will, *viz.* making of Executors is wanting in the writing: Nay, the pointing of him Executor who is named in a note left with *A B.* is no sufficient making of an Executor, saith the *Summist.* And of such nuncupative Wills, Mr. *Perkins* reasonably saith, that it properly hath place, when one suddenly taken with sicknesse violent, dares not stay the writing of his will, for fear of prevention by death; and therefore prayes his Curate and others to witnesse what his Will is. To this Will not written there must be seven witnesses, and such as come not by chance, but are especially called for that purpose, saith the *Summist.*

Tit. de Testi. Sum. silv. f. 443. b.

If he survive and live a long time, not causing to be writ or attested by witnesses, we thinke it should not stand as his Will.

Id. supra fo. 444 b.

What shal amount to a making one Executor or What words are requisite thereunto.

HAving before made to appear, that the being of an Executor, is an essential

ſential part of a Will, and ſo *de eſſe*, and not *de bene eſſe*, only of a Will and Teſtament; let us now ſee, Firſt, By what words an Executor may be made. Secondly, *De modo*, in what manner it may be done, how the power and authority of Executors may be limited and divided. As to the firſt, though one doe expreſly by Will name or appoint any to be Executor, yet if by any word or circumlocution he recommend or commit to one or more the charge and office which pertains to an Executor, it amounteth to as much as the ordaining or conſtituting of him or them to be Executors: As if hee declare by his Will, that *A B.* ſhall have his goods after his death, to pay his debts, and otherwiſe to diſpoſe at his pleaſure, or to that effect, by this is *A B.* made Executor, as was conceived by the Judges in the late Queens time. And long before that, it was held, That if one doe will only that *A B* ſhall have the Adminiſtration of goods, he is thereby made Executor: yea, in the ſaid late Queens time, one giving divers Legacies, and then appointing that his debts and legacies being paid, his wife ſhould have the reſidue of his goods, ſo that ſhe put in ſecu-

If *A B* bee made Executor, and to him & *D* ſome goods are deviſed to be diſpoſed for his ſoule, *D.* is by this an Executor for theſe. 39 H 6. Dy. 100. M 15. & 16 Eliz. 21 H. 6. 6, 7.

ſecurity for the performance of his Wil; by this, without more, was ſhee an Executor, as was held by three Juſtices, (*Viz.*) *Manwood*, *Harper* and *Monnſon*, in the Lord *Dyers* abſence. And ſo alſo where an Infant was made Executor, and *A* & *B*. Overſeers, with this condition, That they ſhould have the rule and diſpoſition of his goods, and payment & receipt of debts unto the ful age of the Infant; by this were they held to be Executors in the meane time. And if *A* be made Executor, and the teſtator after in his Will expreſſeth that *B* ſhall adminiſter alſo with him, and in ayde of him; here *B* is an Executor as well as *A*. and if *A* refuſe, *B* alone may prove the Will as Executor, notwithſtanding it be only ſaid, he ſhall adminiſter with *A*. and in aid of him: thus many wayes, and by divers words of implication one may be made Executor, although not expreſſly ſo named by the Wil. But if *A* be made an Executor, and *B* a Coadjutor, without more, he is not by this an Executor with *A*. as in K *H*. 6. his time was held; nor hath ſuch Coadjutor or Overſeer any power to Adminiſter or intermedle, otherwiſe then to counſel, perſwade and adviſe; yet

31 H. 6, 6. 24. Ed. 3 F. Exec. 111 29 Ed. 3. 39

yet I think he may, and in conſcience ſhould ſo do: And if that will not prevaile to rectifie negligence, or miſcarryings in Executors, he ſhall well perform the truſt repoſed in him, if he complain in the ſpiritual Court, or Court of Conſcience; and it is reaſon, I thinke, that ſo doing upon juſt cauſe, his charges be borne out of the Teſtators eſtate, or the Executors purſe, who otherwiſe would not be reformed.

How an Executor or his Executorſhip may bee limited or qualified in ſpeciall manner, different from the generall.

NOw let us ſee how this making of an Executor may be ſpecially qualified; and firſt, the time may be limited when he ſhal firſt begin to be Executor; and that either certainly, or with ſome contingency. Secondly, the creation may be conditionall. Thirdly, it may be partiall or dividedly, and not intirely.

As to the firſt, one may appoint *J. S.* to bee his Executor a yeere or more time after his death, this is good.

So

So also if *A* appoint *B* his son to be his Executor, when hee shall come to full age, and in the meane time he dieth intestate. Againe, one may appoint the Executor of *A* to be his Executor: and then if he die before *A*. he is intestate untill *A* die. This creation may also be conditional, and the condition may either be precedent or subsequent. In the time of K. *H.6.* one named *A* and *B*, his Executors, and if they would not take it upon them, then *C* and *D*. should be his Executors, and then there *A* and *B* refused, and the question was, whether in suit against the debtors of the Testator, *A* and *B* should joyn with *C* and *D*. as where foure Executors being named, and two refuse, and the other two prove the Will, yet all four must be named in suite against the Testators debtors, as was there admitted: but in the principal cause it was resolved, That the suite should be only in the name of *C* and *D*, for that the appointment of them Executors, if *A* and *B* did refuse, did imply, that then they onely should be Executors. And here all four were never made, nor intended to be Executors, but *A* and *B* upon a condition subsequent

Vide Grosbrook & Fox Plowd. *A* and *B* made Executors, but not *B* to intermeddle during the life of *A*. and good. 32 *H.* 8. *Bro.* 155.

3 *H.6. fo.6.*

sequent, that they should not refuse: and *C* and *D* upon a condition precedent, *viz.* if *A* and *B* did refuse. It is usual to make one or more Executors, conditionally, that they put in security to pay Legacies, or in generall to performe the Wil; nor was it ever doubted, as I think, but that this was good: yet I should advise, that such condition be plainely thus expressed, *viz.* either thus; that if *I S* do put in security, &c. by such a day, that then he shall be Executor, else not: or thus, *viz.* to make him Executor conditionally, that before he do administer (Funeral perhaps excepted) hee shall put in such security; else perhaps hee being Executor till the Condition broken, in that mean time he may have disposed of all, or most part of the Testators estate. In the late Queens time, there was a Case remarkable to this purpose: One Willed, that if his wife suffered *I S.* to enjoy Black-acre (being belike part of a Joynture) for three years, then she should be his Executor, or else *A B.* should: and the question was in the Common Pleas, whether presently before the end of the three years, shee were Executor, or not till she suffered the

P 33 Eliz. Also Francis her case.

the Land to be enjoyed three yeers; and it was held by all the Judges, but the Lord *Anderſon*, that ſhe was preſently Executor, until ſhe ſhould diſturbe *I S* &c. for upon that done, it was agreed, that the Executorſhip would, by vertue of the Condition, be transferred from the wife to *A B*. But now during theſe three years might ſhe have diſpoſed of all the goods of her husband; yea, within one of theſe three years, and leſſe time, and then have broken the Condition, and have left to *A B* a dry Executorſhip.

Now to the third Point, one may divide his Executors power three wayes, *viz.* Really, Locally, or Temporally. Really thus; He may make *A* his Executor for his plate and houſholdſtuffe: *B* for his ſheep and cattel, *C* for his Leaſes and ſtates by extent, *D* for his debts due unto him, and ſo divide the power and Adminiſtration of his Executors at his pleaſure. He may divide them alſo, or their power Locally, *viz.* *A* for his goods in *Com. Buck.* *B.* for thoſe in *Com. Oxon.* and *C* for thoſe in *Com. Berk.* He may alſo divide them in time; *viz.* his wife, or any other perſon to be Executor during her life, or during the minority

19 H. 8. 3. 19 H. 8. Dyer 4. Hil. 33. Eliz. in Com. b.

31. H. 8. Brit. 115.

nority of his ſon, or ſo long as ſhe continues widow, and after his ſon to be Executor. So of like limitations or diviſions, either for time, place, or things, wherewith they ſhall intermeddle. Nay doubtleſſe, one may be made Executor for one particular thing only, as touching ſuch a Statute, or Bond, and no more; and thereof good uſe may be made, as I think thus. Many have Bonds, Statutes, and Recognizances, for warranty or enjoying of Land, or freeing, or ſaving harmleſſe from incumbrances, in general or particular: Now he which hath theſe, ſelling the Land, may by Letter of Attornie lawfully aſſigne them to the party who buyeth the Land or Leaſe; but this notwithſtanding, the intereſt remains in him who ſelleth, and by his outlawry they may be forfeited, or by him releaſed any Bond to the contrary notwithſtanding; and if he die, the intereſt in Law will be in, and go to his Executors, and in their names; only Suit or Execution may be had and maintained.

Quer. If not *Aſſets* in Law when obtained.

Now then, if the Vendor, beſides aſſignment, make, as to this Statute, Recognizance or Obligation, only the Vendee Executor; By this the intereſt,

ter death of the party, will be in him actually and really to his more safety, since none but he can release or discharge, nor any other name need to be used to sue, or take benefit thereof. But *Quer.* if the Vendee, His heirs and assignes may be made Executors, so as that securitie shall go to them one after another without renewed making of Executors. Thus if the party make no other Executor, he dieth intestate as to the rest of his estate, and as to this specialty only shal have an Executor, and must have a Will proved: and in case he doe make another Will for his state residue, there must be two Wills proved. But in the other case, where by one only Will, one is Executor for one part of the estate, and another for another, there being but one Will to be proved, one proving of it sufficeth. And though in the premises of a Will two be made Executors joyntly and equally; yet there may be a *Proviso*, that one shal not meddle during the others life, so as they shall be Executors successively, and not jointly; and thus also to other purposes aforesaid, a subsequent cause or *Proviso* may make the partion and division of authority. But if the *Proviso* or

32 H. 8. Bro. Exec. 55. 1

clauſe ſubſequent, be meerly contrary
the premiſes, it will be void; as whe
two were made Executors, with a *Prov*
or clauſe, that one of them ſhould n
19. H.8.Dy. 3.4 Adminiſter his goods. This was he
voide for repugnancy by *Brudnell* an
Engleſield Juſtices. But *Fitzherbert* Ju
ſtice was of mind, that it was not void, no
utterly repugnant. For the other migh
joyne in ſuits, though not Adminiſter
and Juſtice *Shelly* was of a third opinio
different from all the reſt, *viz.* that he
was a repugnancy; but the laſt clau
ſhould control the premiſes, and ſo th
one only ſhould be Executor.

Who may make an Executor.

SOme perſons may be unable to ma
Wills, and conſequently Executor
for that is all one: whoſoever may ma
a Will may make an Executor. There
nineteen ſeverall kinds of perſons unabl
as the *Canoniſts* ſay, to make Wills, b
with many of them wee will not inte
meddle, becauſe we find no mention
them in our Law. The perſons principall
& moſt uſefully to be conſidered of by u
are either the defective in underſtandin

s Infants, Idiots, Lunaticks, and the like; r defective in power or interest, as wo- nen covert or married, persons outlawed, ttainted, convict or excommunicate. ome touch we wil give of others, as Ali- ns, Corporations, Villains, Monks & Fri- rs. As for infants and women covert, be- ause much is to be said of each of them nd their Administrations, we wil forbear o treat of them in this place; but after vill do it of each severally.

To begin with an Idiot; naturally he is ot able to make a Wil, as was resolved in he Spiritual Court, because he wants the se of Reason to conceive what it is fit or him to Wil; nor doth the Common aw oppose this, as I think. 3 Eliz. D. 203, 204.

A Lunatick, having *Lucida intervalla*, hat is, some seasons of enjoying his right nind, and freedom from his Lunacy, may n those times of his right minde make a Wil & Executors, else not: for even one by ge or sickness become of *non sane memo- ie*, is unable to dispose of lands or goods.

One deaf and dumbe born, may make Grant, saith Master *Perk.* if he have nderstanding, which is hard, as he confes- eth, consequently much more a Wil; ut in the time of K. *Hen.* 8. it is left a *Vide plus la* Perk. 5. 6. 33. H. 8. *Dy.* 55, 56 *Vide* 26 Ed. 3. 63. bb. *Intr.* 396.

demurrer, whether a Deede by suc
be good or not. If but mute, he m
wage his Law, and atturne by signe
and, so perhaps by signes declare his W
44 *Ass. p.* 36.

28 *Ed.* 3. 53. 26. *Ed.* 3. 63. So in effect. 44. *Ass. p.* 36 *P.* 31. *Eliz. Pascatia de Fo n aines* Case.

An Alien may make, or be an Exec
tor, so as he be not an Alien enemy, f
such cannot sue, as in the late Queen
time was held; but there the doubt w
whether a subject of *Spain* were at th
time to be held an enemy, no war bei
proclaimed between the Kingdome
though hostility exercised.

As for persons Attainted, Convicte
or Out-lawed, it will be said, that the
can have no goods of their owne, a
consequently they can make no Wi
nor Executors; and it is not to be de
ed, that we find it pleaded sometimes
Executors, that their Testators sto
out-lawed. But first it is clear, that
and every of these may have goods
Executors to others, which neither
forfeited by Attainder or outlawry, n
divested by marriage or Villanage. Th
fore as touching them, they may ma
Testaments. And that all these sorts
persons may be Executors, is also evide
So also touching Villains, Monkes a

Frie

Friers, who can have no goods to their own uſes. And that one attainted of Felony may have an Executor, appeares by the Caſe in the late Queenes time, wherein it was long debated, whether ſuch an Executor might maintaine a writ of error, or not, to reverſe the attainder of the Teſtator: And as for other Out-lawries, the Plea thereof by the Executors, that their Teſtator was, and died out-lawed, proves not a nullity of the Will, or Executorſhip: for then they might have pleaded, that they were never Executors. But it tends to this, that no goods did, or could come to them for ſatisfaction of the debts by reaſon of out-lawry; yet it hath been delivered, not of old only in many books, but by ſome of late, that debts upon contract, where the defendant may wage his Law, are not forfeited by out-lawry, nor uncertain damages for treſpaſſe in battery, or falſe impriſonment, &c. *Quar.* Of breach of Covenant. But goods taken away by a treſpaſſer, may yet be forfeited by the attainder or out-lawry of him from whom they were taken, for that the property in right ſtill appertained to him, and he might have taken them

29 Aſſ. P. 63. 49. Ed. 3. 5. 50. Aſſ. P. 15 33. H. 6. 27 9 Eliz. D. 26. 2. Comm. Ca. lib. 4. fo. 95. 19. H. 6. 47 30. Ed. 3. 4 16 Ed. 4. 9 5 Ed. 3. 53 6 R. 7.

them again whereſoever he found them, therefore the action for this ſhall not come to his Executor, but for the other not forfeited, it may.

15. H. 7. fo. 7. Whether an Excommunicated perſon be able to make a Will or not, may bee ſome doubt, ſince *Keble* denieth him ability to preſent to a Church; and in the very point anciently the opinion of *Canoniſts* hath beene Negative, but more lately grew Affirmative.

Sylvest. Silv. tit. Teſtam.

Who may be Executor more.

43. E. 31 AN Excommunicate perſon cannot ſue; that is, procede in ſuit as Executor till he be abſolved, there being danger of Excommunication to all that converſe with him; but this makes not the nullity of his Executorſhip, nor overthrowes the ſuit, but ſtayes it only from proceeding untill abſolution. As for perſons attainted or outlawed, we have before ſpoken Affirmatively in way of proof, that they may make Executors for continuation of the Executorſhip; ſo of Aliens, and others before. Recuſants convicted at the time of the death of a Teſtator, are diſabled to be his Executors.

21 H. 6. 36. A Clark attaint may be an Executor by Paſt. Juſt. Peſcatio de Fountain. But an Alien enemy cannot ſue as Executr. P. 31. Eliz. 3. Jac. cap. 5

Whether Corporations, Compound

or consisting of divers persons, may bee made Executors or not; I doubt. First, because they cannot be Feoffees in trust to others use. Secondly, they are a body framed for a special purpose. Thirdly, they cannot come to prove a Will, or at least, to take an oath as others doe.

What a man may give or dispose by his Will.

HAving considered of the makers of Executors by Will, and of them so made. Let us now consider what by this Will may be disposed, given, or bequeathed. And first, he who himself is an Executor, cannot by his Will give or bequeath to any other the goods, chattels, or credits he hath as Executor, the property not being altered; for that he hath not them properly as his own, or to his owne use: only he may make a continuation of the Executorship, and his Executor shall have them as Executor to the first Testator, as was resolved by the Judges of both Benches, in the late Queens time. And if he bee Administrator, the bequest is then also void, nor then will they goe to his Executor, but to a new Administrator; but on his death

Brinsly Verf. Grantham. Plow. Com. f. 538.

Hil. 30. Eliz.

death-bed he may give them by Word or Deed, though not by Will. Next, if a man have debts owing to him, as many have much, it is considerable, whether by way of bequeſt in his Will, hee can give away theſe to any from his Executors. And doubtleſſe he cannot effectually in Law, they being not ſubject to aſſignment unto any except the King. So as, if he give ſuch a debt to *A.* and ſuch to *B.* yet muſt the ſuite for them be in the name of the Executor; and ſo alſo the Releaſe or Acquittance for them, and not in their names to whom the bequeſt is. But when they be received, if there be no debts to pay, the Executor ought to deliver them to the party to whom the bequeſt is, and thereunto may be compelled in Court of Conſcience, or in the Spirituall Court. Therefore the Caſe of the bequeathing money payable upon a Mortgage, is in this manner to be underſtood to be good, and not otherwiſe as Prake it. He that is joyntly with any other eſtated in Lands or goods, can give no part by his Will, but all will ſurvive: but by act in his life he may diſpoſe of his part, and the Aſſignee may diſpoſe of his moiety by Will, yea though

At any time in his life he may alter the property.

So 48 E. 3. f. 14, 15. Where the bequeſt was to one of the Executors, it was held that the other Executor might releaſe it.

If ſufficient, otherwiſe to pay all one as if none.

48. E. 3. p. 14, 15. 11. Ed. 3. Fitz. Tit. Cond. 9

Where both eſtated jointly by one Grant.

Differences between joint tenants and tenants in common, holding by ſeverall Grants.

it be half an Horſe or Oxe, that cannot be divided. So of a Leaſe of Landes, or Tithes, or Grant of goods to two, *habendum*, one moyety to the one, and the other moiety to the other; each may give his moyty by Will. But if one be poſſeſſed, or eſtated for years by Leaſe, Wardſhip, or Extent &c. in the right of his Wife, or have the next avoidance of a Church in her right, he cannot by Will give or bequeath any of theſe; but notwithſtanding they will remaine unto his wife upon his death; but yet his gift or Grant of them, taking effect in his life time, would bind his wife, and carry away the intereſt from her. If one be Tenant for the lives of one or more others, as oft times men take Leaſes for lives of younger perſons than themſelves, this cannot be by Will diſpoſed of, for that it is no chattel, nor is it within the Statutes of Wills, for that it is no ſtate of inheritance: Therefore let the party look to convey it in his life time, leſt it go to an Occupant, *viz.* him who firſt ſhall enter. If it be an eſtate in Land, he muſt either make Livery, have a bargain and ſale inrolled or covenanted to ſtand ſeized to the uſe of his wife, or ſome of his

Another kind of Tenants in Common.

his blood, or make a Leaſe for yeares determinable upon thoſe lives: Good it be by bargaine and ſale for yeares, if the thing be in Leaſe, that ſo without Inrollment or Atturnment the Rent may paſſe, elſe a bargaine and ſale may be made for a moneth, or ſuch like time; and then a Releaſe or Grant of the reverſion, in ſtead of Livery and Seiſin. But if a man have a Leaſe for never ſo many yeers, determinable upon life, or lives; that is, if ſuch or ſuch live ſo long (which unskilled perſons call a Leaſe for lives) this State may wel enough be given and diſpoſed by Will, becauſe it is but a chattel. If a man ſeized in Fee, or in Tayle of Land, having Corne growing upon it, and by his Will doe give the Corne, and die before ſeverance, this is a good bequeſt; becauſe, the Corne ſhould have gone to the Executor. So it is alſo of a Parſon touching his Glebe, and a man ſeized in the right of his wife, or his owne right but for life. But as for trees growing upon the ground; theſe can no otherwiſe be given by Will, then as the Land it ſelf upon which they grow, may be given; of which matter,

Stat. Merton cap. 3. vidua poſſit Legare rem de dotibus quam de aliis &c.

as not pertaining to the Office of Executors, *viz.* How, and in what manner Lands may be given by Wil, I intend not to treat in these discourses.

Quer. If the trees may be devised by the Statute of Wills, without giving the Land it self.

Of the Revocation and Countermand of Wills, and new Publication.

HAving considered of the making of Wills and Executors. Let us before wee come to the *Probat*, consider of Revocation, for that may take away the force of a Will rightly made. A Will therefore having two parts, *viz.* *Inception*, which is the making; and *Consummation*, which is the death of the Testator or maker of the Wil, there is power in him at any time before death, to revoke or alter his Will at his pleasure. Consider we therefore of Revocations, and also of new Publications, or *Reaffirmance* of Wils, in whole or in part. As therefore a Wil may be made by Word; So also may a Will made in Writing bee by Word revoked or disanulled: for since every making of a later Will is a Countermand and suppression of the former Will, and since a Will may be made *Nuncupatively* or by Word, and so

Omne testamentum morte consummatur. See the pleading of it by making a later Will. lib. *Intrusi*, 323. b. & 641 a.

ſo by making a verball Will, one may revoke a written Will. It will thereupon follow, that one by Word may expreſſe the alteration of his minde thus far, that the Will by him formerly made, ſhall not ſtand, but be revoked and annulled; and this will ſtand and be effectual, ſo as if he after die without making any new Will, or new Publication, or Reaffirmance of the former, he dieth inteſtate or without will. As a Will may be wholly revoked, ſo alſo in part: Hereabout a good reſolution was in a *Kents* Caſe, where one *Ryete* by his Will in writing did give ſome Gavel-kind Land to one *Harriſon*, and five dayes before his death, ſaid in the preſence of witneſſes, that this gift ſhould not ſtand, and that he would alter it when hee came home, deſiring them to bear witneſſe of his Revocation. Now before hee came home he was killed by the ſaid *Harriſon*, who cauſed the Will in writing to be proved; and after he was attainted and hanged for the murther, and his Sonne by the Cuſtome of *Kent*, (*viz.* the Father to the bough, and the Son to the plough) entred into the Land, and this manner of Revocation by word

14. *Eliz.* Pl. 310. b.

only

only was held sufficient, although the Will in writing were not cancelled nor defaced. And the like resolution for verbal Revocation, is implied in the Case of *Forse* and *Hembling*; where it being resolved that a *Feme* Covert, or married woman by word Countermanding and Revoking her Will formerly made, when she was a sole or unmarried Woman, this was not effectual, nor of force, by reason of her Coverture, taking away the freedome of her Will. Hereby it is implied, that another who hath freedome of Will may by Word sufficiently revoke a Will in Writing; and so was it since also admitted in the Case betweene Sir *Edward Mountague* and *Jeoffryes*, touching the Will of Sir *Jo. Jeoffryes*: but there a difference was conceived betwixt saying, I wil revoke my Will, which only expressed a purpose or intent, and therefore was no present Revocation; and saying, I doe revoke it, or it shall not stand, or my heir shall have my Land, which crossed the gift of it by the Will. And as Wils may be wholly or in part revoked, so may also the Executorship of one or more of the Executors, and yet the Will may stand in all the other parts

M. 28. & 29 *Eliz. Co. lib.* 4. *f.* 60.

7. *H.* 6. *f.* 15. *M.* 38, 39. *Eliz.*

parts, ſo as there be any one Executo
or more unrevoked: but if all be revo
ked, then the whole Will is revoked
becauſe no Will can ſtand without Ex
cutors: and this Revocation may be
by Word only, without being expreſ
ſed in the Will or any other writing. Bu
I would wiſh all to expreſſe ſuch Revoca
tion in the foot of the Will, or tha
the name or names of the Executor o
Executors ſo revoked be expunged o
blotted out of the Will, and that this b
done in the preſence of ſome witneſſes t
teſtifie the act and intent of the Teſtator.

Again, Revocations may be by act i
Law, as well as in fact, or by direct an
expreſſe terms, as in the ſaid Caſe o
Mountague and *Jeoffryes*, where Land
being deviſed by Will, and the Deviſor
after making a feoffment, though there
were ſome defect in the Livery, to make
it effectual; or if he made a bargaine and
ſale, that was never inrolled, or granted
the reverſion, but no attornment had
ſo as the Land paſſed not, yet in all theſe
Caſes the Will or gift of Land ſtood re-
voked: But in Caſe he had only Cove-
nanted that he would have made ſuch
an eſtate, and not done it, this was held

to

Vide 6. E. 6. Dy. 74 & 3. & 47. & Ma. 43. a.

to be no Revocation. And so by some, in case he do but make a Lease, leaving the Fee-simple as it was, but of this *Quare*; And if a difference may not be betwixt making a Lease for years, and a Lease for life, which altereth the Freehold? If a Lease for twenty years be bequeathed to *I. S.* and after the Testator maketh a Lease for fifteene years, reserving a Rent, I take this to be no Revocation of the bequest; but if the Testator after this Will made, take a new Lease for a longer terme, so as the former Lease is surrendred in fact or in Law, this must needs be a Revocation of the bequest, or at least an adnullation thereof; and that although the bequest were generally of his Lease, not mentioning the number of years: for this which he now hath, is another Lease, and not that which hee had at the time of the making of the Will. So, if one give his black gelding by Will, and after, before his death, he selleth or giveth away that Horse, and buyeth another black one, this new gotten Horse shall not passe by the Will, because it was not the Testators at the time of making his Will. So also, if the Crop in the Barn be bequea-

thed in *October*, and the party lives til th
time twelve month, having sold that Cro
and Inned a new, this later Crop shal n
passe by the Will, and the former cannot

Again, as revocation may be by alte
ration of the state of the Devisor, in th
land Devised; so may it also be by al
teration, in some case, of the state o
quality of the person of the Devisor. A
if a woman sole make a Will, and afte
take a Husband, this without any more
as is resolved in the said case, of *Forse* an
Hembling, doth work a Revocation, o
adnullation of the Will, for that el
it should be irrevocable, since shee ha
ving lost the freedome of her Will, can
not actually and directly make a Revoca
tion, as we before have shewed. But not
withstanding her Will be revoked, yet i
case her Husband before or after marri
age with her, were bound or Covenan
ted to perform this womans Wil, if he s
do not, by paiment of the legacies ther
in bequeathed, his Bond or Covenant w
stand good, and be suitable against him
as was adjudged touching the Will o
Elizabeth Smaleman, married after he
Will made to one *Wood*, who first w
bound to perform it. Yet another ca

M 25, 26 Eliz.

the

there is of Alteration in the ſtate of the Teſtators perſon, which makes no Revocation of his Wil. As if he being of ſound mind and ability, make a Will, and after becometh frantick. In this caſe this is no Revocation: So as his Wil ſtands till his death irrevocable, if he recover not. Now of a Will Revoked, there may be a reviver by a new Publication, and thereof now.

Of new Publications.

HAving ſhewed how a Will may bee revoked, and ſo loſe its force; let us now ſee how without making a new Will, that ſo revoked may be rivived, and ſet on foot againe. And that is divers wayes: as Firſt, by a *Codicell* annexed after thereunto, as was reſolved between *Betford*, and *Barnecot*, in the Kings Bench. Secondly, by adding any thing to the Wil, or making a new Executor. Thirdly, by expreſſe ſpeech or word, that it ſhould ſtand or be his Wil; as I conceive, to have been the better opinion in the ſaid caſe of *Mountague* and *Jeoffryes*, wherein yet was much difference of opinion, both touching

M 38, 39 Eliz. in Banco reg.

Revocation and new Publication. If
44. Ass. p. 36 man having made a former Wil, do mak
a later, which is more than a bare Revo-
cation; yet if afterward lying upon h
death bed, and speechlesse, both the
Wills be delivered into his hand, an
he required to deliver to one of hi
friends about him, that Will which h
would have to stand, and to keep in hi
hands the other; hee thereupon delive-
reth to the Minister or other his neigh-
bours, the first made Will, retaining i
his hands the later, as was done in th
time of *Edward* the third; here th
44 Ed. 3. fol. 33. former will, though made void man
yeers before by the later, is revived
and shall stand as the parties Will. Bu
now put the case that a bequest at th
first is void, yet by publication after,
may bee good; as if one give to *Sara*
his wife a piece of Plate, or other thing
and hath no such wife at the time, b
after marryeth one of that name, an
then publisheth his Will againe; no
this shall be a good bequest. So if o
Devise Lands or Goods which one ha
not; If he after do purchase the same
and then say that his Will before ma
shall stand, or bee his Will, It sh

be a good Will and Bequeſt, for this in effect a new making. And though moſt of the precedent caſes be of Revocation of particular parts of the Will, and not of the total: Yet firſt, be it conſidered that that part ſo revoked was in effect the ſubſtance of the Wills: Next, it is eaſily diſcerned that if one part be revocable, ſo is another alſo; And thus Revocation may ſpread it ſelfe over the whole; nay, doubtleſſe the whole *Uno flatu*, may be revoked, as well as by parts, even as a fagot may be put wholly into the fire, as well as ſtick by ſtick. And as the *Velleities* or diſpoſing parts of the Will, are revocable and revivable by new Publication as aforeſaid, ſo is alſo the conſtitution of Executors. As if one of the Executors names bee ſtricken out, and afterwards a *ſtet* be written over his head by the Teſtator, or by his appointment, now is he a revived Executor. So if the Teſtator expreſſe by word, in the preſence of Witneſſes that the party put out ſhall yet be Executor; but now I mean, where the Executors name is not ſo blotted out, but that it may bee read and diſcerned;

5 & 6 P. M. Dy. 143.

for else the *stet* is upon nothing; and if the Verball reaffirmance should renew his Executorship, then must the Will be partly in writing, and partly *Nuncupative*, his name not being to be found in the written Will.

CHAP. II.

Of the State of things instantly upon the Testators Death, before any Will proved.

Here we will consider these severall things.

1. *What is wrought by a gift of a thing certain and known, as the White Horse, the Red Cow, &c.*
2. *What by a Bequest to an Executor.*
3. *What wrought by a Release in the Will to a Debtor.*
4. *What by making a Debtor, or Creditor an Executor.*

AS touching the first, *viz.* the bequest of a Chattel real, or personal, which the Testator had in possession, notwithstanding

that if the said Testator had by his Deed or writing, or but by word on his death-bed, or before, given these his goods, and dyed before they had been taken, he to whom they so were given, might have taken them; yet in this case of gift by Will, neither can the Legatee, *viz.* he to whom they are bequeathed, either take them, or recover them from the Executor, or a stranger taking them, by any Suite at the Law, for that he hath no property in them; yea if the Bequest be to himselfe who is made Executor, be it of Lease, Plate, Cattel, &c. They shall not vest nor settle in him as Legatee, but as Executor, until expresse, or implyed election: but he is to have and take the same by way of Legacy. And the reason in both cases is this, *viz.* That the Law prefers debts, and the satisfaction of them before Legacies, and ties Executors also to that rule, and therefore will transferre nothing from or out of the Executor, till he having considered of the State of the debts to be paid, and goods out of which the same are to bee paid, shall find that safely this or that legacy may take effect without making any defect in payment of debts, or drawing

1 & 2. P. & Ma Dy. 110 a. & 139. b. vide Co. 8. f. 95 & 96.

Of the second. See Co. 10. f. 47. 652.

So resolved pas. Trin. 37 Eli. in b. a. M. onely Gan. contr. Portman, pl. & Simes dest.

See more of this Tit. Legacy: and of the assent of one Executor only.

upon him and his owne goods any d
mage or losse as a waster; and ther
upon shall assent to such Legacy. Th
now is the Law taken; but heretofo
some opinion hath runne otherwise, vi
27 H. 6. 8. That he to whom any Bequest was mad
Of late perhaps some single or sudden opinions may also have run that way, but in Fortunes case the point was divers times argued, and then adiudged as before.
of a thing known and certain, might tak
it without any assent of the Executor: &
that when to the Executor himselfe an
good or Chattel movable or immoveabl
was bequeathed, in case there were other
wise sufficient goods, for satisfaction o
debts, the same should instantly upon th
Testators death, without any act or ele
ction by the Executor, bee transferre
into, and unto him in his own right, a
a Legacy, and not remaine in him a
Executor. As for summes of money be
queathed, or so much in Plate or Ring
it is evident that they must be had by th
delivery of the Executor: Yet hath th
To bee bought.
Legatee such an interest before deliver
as that dying before payment, it will no
go to his Executors. But as I take it, n
such person to whom any thing certain
given by Will, can make any gift o
grant of it before the Executor have a
sented to his having thereof; Nor per
haps will the Executors assent, after th
gra

rant, have such relation, as to make ood the grant precedent; why so yet, nore then an attornment of a Leassee, which is a like assent to the grant of another? And *Quare* if by the outlawry of he Legatee, before the Executors assent this thing bequeathed be forfeited.

Quer. Of this: see more at the Tit. Legacy, hereabouts.

If without just cause an Executor will refuse to assent, he is compellable by Law spiritual or Court of Conscience, yet if spiritual Court presse to doe, where is ust cause to stay, a *Prohibit* lieth, *ut Credo*; or since executors stand liable to recovery of debts against them by Common Law, it is reason that Law enable them o keepe wherewith to pay. And here et note some seeming opposition in the Law; for where before great difference was shewed between a Devise or Bequest, nd a gift or alienation executed in ones ife time; Yet the Lord *Dyar* reports to be resolved, that where a Lease for ears was made upon condition, that the essee should not alien in his life time, hat yet a Bequest of this Lease by his Will, was a breach of the Condition, as eing an alienation in his life time.

3. Of a discharge by Will to a debtor, some question may be, whether to perfect

perfect and make good this, ſo as t
debtor may plead it in Bar, there
not requiſite, as in the former, an aſſe
of the Executor. On the one ſide, ſin
this giving is a forgiving, for he to who
it is bequeathed, cannot otherwiſe ha
it then by way of retainer, it may pro
bably be ſaid, that here needs no ſuc
aſſent of the Executors, as in the ca
where any thing is to be transferred; ſo
here is rather an extinguiſhment, an
an exoneration then a paſſage of a Cha
rel by way of *Donation*. On the othe
ſide, it is probable that it being but a Be
queſt, and ſo a Legacy, ſi ce debts ar
in Law and Conſcience to be ſatisfie
before any Legacies, that therefore th
Executor having not ſufficient otherwi
to ſatisfie his Teſtators debts, may ſu
for this debt, and refuſe to ſuffer it t
paſſe away as a Legacy. And to thi
opinion doe I encline, as beſt for Cre
ditors; and ſatisfaction of debts is by
Law reſpected as an act greatly concer
ning the Teſtators ſoule. But ſome w
perhaps make a contrary doubt, that a
though there be an aſſent of the Exec
tors to this diſcharge, yet it will not
mount to a legal releaſe, for that a deb

least, if it be by specialty, cannot be released but by Deed, and a Will is no Deed, for a Seal is not necessary thereunto, though it be fit and convenient; whereto I give this answer, that a Will, though it be not properly and legally a Deed, for it may be good enough without a Seal, which is an essential part of a Deed, yet hath it the force and effect of a Deede: for as a Release cannot be made but by Deed, so neither can an Estate or Interest, though but for years, in Tithes, Advowsons, Commons, Fairs, and like things, be granted or assigned otherwise then by Deed; yet it is clear that such a state for yeers in any of these may be given by Will, as well as a lease of Land, which proves a Wil to have the force and effect of a Deed.

Not de esse, but de bene esse.

Of making a Debtor or Creditor, Executor: and first of the Debtor made Executor.

SUppose we then that *A* and *B.* being made Executors, the Testator was indebted to *A* twenty pounds, and *B.* was indebted to the Testator twenty pounds, how doe things stand presently upon death? First, it is cleer that the debt of *B.* to

21 H. 7. 31. Plow. Com. 185. cont. Daub. & Choke 8. E. 4. 3.

B. to the Testator, stands in Law extin this making of him Executor, being Release in Law. Therefore let Credit take heede of making their Debt Executors. And yet doubtlesse (a thinkes) such a debter made Exec tor, should hold himself restrained Conscience, from taking benefit ther of, if (the debt remitted) there sh want to satisfie either debt or Legacie the Testator: and I doubt whether Court of Conscience may not justly order, the Testator being perhaps ig norant of this point in Law, that th debt should be released by making th debtor Executor. And what is spoke of making the debtor Executor, genera ly the same is to be understood of makin any one of the debtors Executor, whe there be many joint debtors: and so al so where many Executors be made, an but one of them is debtor to the Testa tor, for they cannot sue without ma king him who is the debtor, also a plain tiffe, which he cannot doe against him self. The like Law touching Actions o trespasse or account: Yet of old, whe one made his Bailiffe one of his Execu tors, together with *A* and *B*. wh brough

And may be granted that hee should account before the Ordinary for it.

Yet it seems *Plowd.* 186. *a.* the Law was taken to be as *supra.* 8 & 4.

Though he never administer. 21 *E.* 4. 3. 81. 11. *H.* 6. 38.

2 *R.* 3. 20. *per Starkey* & 22. *per Vauasor.*

9 *H.* 5. 13 Left a demurrer in trespasse by all, against the Executor, who was trespassor.

rought an action of Account against the ailiffe in their two names only; Justice *Yerle* held the action well brought: this was in the beginning of King *Edward* the third his time; but the contrary hath been since resolved. Some also ave held, that though in the life of this Executor who was a debtor, he could ot be sued; yet after his death, the urviving Executors might sue his Executor: but that cannot be, as I take it, for hat the debt was utterly extinct, by he making of him Executor, as if the Testator had released it to him; yea, hough this Executor died before he did ever Administer or prove the Will. And ike extinguishment of the debt, if the Creditor marry with one of the Executors of the debtor: yet was there an Action of debt maintained *temp. Edward* 3. by the Husband and Wife, against the Husband, and other Executors upon an Obligation by the Testator to the Wife, before her marriage. But if a debtor take Administration of the goods of his Creditor, this me thinks should not discharge him, but that his debt should stand as assets in his hand, because the intestate did no act to free him from the debt.

3 E. 3. 23

4 H. 4. 5
8 E. 4. 3. Chudl.

21 H. 7. 31.
20 E. 4. 17

21 E. 4. 3. 63
Plow. com. 36

Plowd. com. 185.

11 H. 4. f. 83. 84.

31 E. 3 Fitz. Ex. 82.

The

The Debtor or Creditor made Execu

Plow. com. 185 By all the Judges, but Brooke chief Just. Plow. 185 b. where the goods be of more value, which shall bee so altered?

THis making of the Debtee Ex tor, & so the party who both sho pay and be paid, the debt giveth clearly power to pay himself before other, if his debt be by Specialty or u Record. Nay, some have held, tha much of the goods of the Testator sha altered in property out of the Execu as Executor, into him as Credit but how that can be, I cannot see: whether shall it be satisfied out of Leases and Chattels real or personal, w ther out of the Corne in the Barn Cattel in the Fields, Plate or Housho stuffe; this, till some election made this Debtee Executor, cannot be kno nor shall be effected by any operat of Law, preventing the Executors lection, in taking his satisfactio where and how he will. For certsi as an Executor hath election to which Creditor hee will first, so hath election to pay and satisfie himselfe, what part of the Testators goods he yet perhaps if there be ready mony in Executors hands, there shall be an alte

See Plow. com. 544. the like of a Legacy of 20 pound given to the Executor.

Or if the goods amount in all to no more then this debt.

ion of the property of so much thereof
was owing by the Testator to the Ex-
cutor. And if there come not to the
ands of such Executor, sufficient to pay
imself, he may have an Action of debt
gainst the other Executors, or the
eir, as by some hath been conceived:
Yet let it be well advised of, whether, if
e doe Administer at all, and specially,
he pay himself any part, he have not
hereby barred or disabled his suit for the
Residue. But if he refuse to Admini-
ter at all, it were very unreasonable that
e should not be able to sue the other
Executors, for so a debtor might by sub-
ilty make his Creditor an Executor with
others, and take a course that his goods
hould come only into the hands of those
others, so as the Creditor could not
ay himself; and consequently, if he could
ot sue the other Executors, he should
hus be stripped of his debt by a sleight.
Quære, if he may bring the action in
he name of the other Executors, only
he Wil being proved in his name, as wel
s in the names of the rest; or whether the
Action shall be brought in his name
lso, and then he be severed at his owne
rayer. But against the Heire there is
none

See Plow. cum. 185
13 H. 8. 15
11 H. 4. 83
12 H. 4. 21
20 E. 4. 17
21 E. 4. 5

Plow. 184. b. & 185 b. He is barred for he cannot apportion his debt.

none to joyne with him, and him
he sue if he have not Administred as
ecutor; this admitted, that the Bond
tend to the Heire, which without expr
words it doth not, though for the E
cutor it be otherwise.

Thus having considered of the St
of things before and without any W
proved or other act done by Executo
we should now come to the point
proof; but two things, pertinent to
are in Order precedent.

11 H. 4. 21. He may sue that Heire if the Heir be bound, and he have not sufficient goods as Executor.

CHAP. III.

1. *What may be done by or to an E*
cutor before proving of the Will.

2. *Of Refusal, and the things incid*
thereunto.

Before probate, what may bee done by
Executors.

AS to this it is clear, that bef
proving of a Will by the Execut
he may seize and take into his hands
of the goods of the Testator, yea e
in

into the house of the Heir (if not locked) so to doe, and to take the specialties of debts; and generally he may do all things which to the Office of an Executor pertaineth (except only bringing of Actions and Prosecution of Suits.) He may pay debts, receive debts, make acquittances & releases of debts due to the Testator, and take leases or acquittances of debts owing by the Testator: Yea, if before such proving, the day occur for paiment, upon bond made by or to the Testator, paiment must be made to or by this Executor, though no wil be proved, upon like pain of forfeiture, as if the Will were proved. Also an Executor may before *Probate*, sell or give away any of the goods or Chattels of the Testator. And whereas the assent of an Executor is necessary to the setling and Execution of a Legacy, as before hath been shewed; So as if one give me his white Horse, or black Cow, by Wil, or any other well known thing, I cannot after his death take it, though I come where it is, but am punishable by action of trespasse, at the Executors suit, if he doe not assent; yet an Executor before the Will proved, may give his assent, and it will stand good. Yea, although

9 E 4 f. 33 47-7. H. 4-18. They cannot sue till they have the will under the seal of the Ordinary.

Wray. 23 El.

he die after any of these acts done, the Will being never proved by him, yet do these Acts so done, stand firm and good, as I take it. Yet (as I find) an Executor, making his Will, and dying before he had proved the Will of his Testator, his Executor may not prove both the Wills, and so become Executor to both the Testators. But in case the goods were, after debts paid, bequeathed to the Executor, his Executor may take Administration of the first Testators goods, with the Will annexed, as by Doctor *Drake* was in the late Queens time declared to be the Law, and course of the Court Spirituall; to which credit was given by the Judges of our Law, and the Court of *Star-Chamber*: for though the Book do not mention it to have been in *Star-Chamber*, it is elsewhere so reported: Yea an Executor, for goods of the Testator taken from him, or a trespasse done upon the Lease-Land, or a Distraining, or Impounding of goods or Cattel, may maintaine, before the Will bee proved, actions of Trespasse, or *Replevin*, or *Detinue*; for these Actions arise upon the Executors owne possession.

22 & 23. El. Dy. 372.

Dy. in Pl. com. 281. Case of Greisbrook & Fox.

But before the proving of a Will, an Executor cannot maintaine a ſuite or action of debt or the like. And the reaſon is, for that therein he muſt ſhew forth the Will proved, under the ſeale of the Ordinary. And ſo, as I take it, muſt it be, if he bring any Action for treſpaſſe done, or goods taken in the Teſtators life time, ſo as the Teſtator himſelf was intituled to the Action, and it growes not upon the Executors poſſeſſion. I find that an Executor granting the next avoidance of a Church which to him came from the Teſtator; the Grantee maintained a *Quare impedit*, without ſhewing forth the Wil: But the Executor himſelfe might ſo have done, as of his own poſſeſſion before the Will proved, and ſo without ſhewing it under the ſeal of the Spiritual Court, as well as Actions of Treſpaſſe, or *Replevin*, for goods taken after the death of the Teſtator: yet in the Principal caſe of *Greyſbrook* and *Fox*, which was an Action of *Detinue* by the Executor, for goods taken or detained after the Teſtators death, the Plaintiffe did ſhew forth the Wil proved. But that proves not any neceſſity thereof, or that if the Will had not beene

34. P. & M. Dy. 135. a Dy. in Plow. com. 281. a.

Plow. com. 275 b.

proved, it could be no hurt to ſhew it forth; ſo upon his own contract for the Teſtators goods, as if the Executor ſell Cattel, or other goods of the Teſtator before the Will proved, he may for the mony payable, maintain an action for debt before he have proved any Will: and in this and the action of Treſpaſſe, there is no neceſſity of naming him Executor. Alſo on the other ſide, an Executor may well enough be ſued for debts of the Teſtator, before the Will be proved; for he may not by his own Act of delaying the *Probate* of the Wil, keepe off Suits, except hee will refuſe in due manner, that ſo Adminiſtration being granted, there may be ſome body Suable by the Teſtators Creditors, for debts by him owing. And the uſuall plea of the Defendant, to eſtrange himſelfe from the Teſtament, is to ſay, that he neither is Executor, nor hath Adminiſtred as Executor. So as if he either be Executor *De jure*, or *De facto*, by his owne act of Adminiſtring, it ſufficeth.

Of refusal to prove the Wil, and therein of Administration, forecluding refusal.

NOw touching this other point, fit to be thought of, before we meddle with the *Probate*, *viz.* Refusal to prove; we will thereabout consider these several parts, *viz.* Firſt, how, and in what manner refusal may or must be. Secondly, in what Cases, or in respect of what acts one named Executor hath loſt or determined his election of refusal or acceptance. Thirdly, of what effect and operation the refusal is, what difference, where all the Executors refuse, and where but some or one of them. Fourthly, what relation it hath.

Now touching the firſt, the Ordinary, before committing Administration, where a Will is made, and Executors named, if he know of it, must send out Proceſs againſt the Executors, to come in and prove it, and if they do not come, they are to bee excommunicate; but if they doe come, if they nor any of them will prove, by reason of such refusal, the Ordinary may commit Administration; perhaps also they may be appointed Executors at a time future, and not presently.

3 H 7.14.

9 Ed.4.47
3 Hen.7.14
Plow.com.1 281.

Now refusal cannot be verbally, or by word, but it must be by some act entered or recorded in the Spiritual Court, and therefore must be done before some Judge Spiritual, and not before Neighbours in the Country; for that is not effectuall. Yet Sir *Ralph Rowlet*, making the Lord Keeper *Bacon*, *Catlin* Chief Justice, and the Master of the Rolls, Executors; they wrote a Letter to the Ordinary, that they could not attend the Executorship, and therefore wished him to commit Administration, who did so; making every of their Refusals to be recorded, and this was held good: So as a Lease being by that Will bequeathed to *Catlin*, and he after this refusal entring and assigning it to one, and the Administrator assigning it to another, it came in question between them, whether had best right, and judgement was given for the assignee of the Administrator against *Catlins* assignee; whereas, if the Refusal had been void, *Catlin* had continued Executor, and so his title had been better. For, in case the Ordinary himself be made Executor, there (saith the Booke) hee may refuse before his Commissary; and so was it there pleaded for the Arch-Bishop of

9 Ed. 4. 33 See Pl. 184. If Debtee made Executor, sue the Ordinary for the debt; this amounts to a refusal of the Executorship.

M. 28 & 29 Eli. Inter Brooker & Carter. in ba. row.

9 Ed. 4. 33 The Booke calls him Cardinall of Canterbury.

Can-

Canterbury, who was made Executor to Sir William Oldhalle.

What shall be such a medling or Administring by an Executor that he cannot refuse after.

AS to the second, where an Executor hath Administred, he cannot afterwards refuse, because he hath already accepted of the Executorship, and so determined his election: at least the Ordinary ought not to accept of such refusal, but should compell him to take upon him the Executorship, as the Law was taken both in the time of *Ed.* 4. and of Queen *Elizabeth*: Yet if the Ordinary do admit one to refuse, notwithstanding that he have Administred: this standeth good, as it seemeth, conceived by the Judges in the time of *Hen.* 6. for where the Executor commanded one to take goods of the Testator, out of the hands of *I S.* who did accordingly, and afterward the Executor refused before the Ordinary, and Administration was committed to the said *I S.* who brought an Action of Trespasse against the party for taking the goods from him, and there

9 *Ed.* 4. 47. selling land as Executor is Admin. *Dyer* in case of *Greinbrook & Fox.* Pl. com. 280. b. Pas. 7. *Eliz.* 36. *Hen.* 6. f. 7. 8

the refusall and committing Administration were admitted to be good: so perhaps *Factum valet quod fieri non debuit.* And it well may be, that the Ordinary did not know of the Executors such intermedling at the time when he did admit of his refusal. After Refusal and Administration committed, the Executor cannot go back to prove the Will, and assume the Executorship: but if only upon the Executors making default to come in upon Processe to prove the Will, the Administration be committed, here the Executor may yet at any time after come and prove the Will, and so undo the Administration: as was in the late Queens time resolved betweene *Bale* and *Baxter*.

Mich. 27 28 Eliz.

But what if after refusal, it shall appear to the Ordinary, that the Executor had administred before his refusal, so as had it been then known, the Ordinary should not have admitted him to refuse; Whether now may he revoke his Administration (for it is revokeable) and inforce the Executor to proceed to proving of the Wil? And surely me thinks he may, for that the Executor by Administring had determined his election

Baxes Case *in com. ban.*

and

and accepted the office of Executorſhip; now he cannot both accept and refuſe. Beſides, we know, that Creditors may maintain their Suits againſt him, having once Adminiſtred; the Common Plea to free himſelf, and ſhew that he is not the party ſuable for the Teſtators debt, being, that he neither is Executor, nor ever did Adminiſter as Executor; wherefore he having adminiſtred, it wil be found againſt him. Now it is not Congruous, that in the Spiritual Court there ſhould be no Executor, and yet in the Courts of *Weſtminſter* there ſhould be an Executor. But ſince this point of Adminiſtring is ſo materiall to the point of being admitted, or not admitted to refuſe, we will here conſider in this place briefly what ſhal be ſaid to be an Adminiſtration by an Executor, determining his election, and diſabling his refuſal, and what not. 1. Some wil perhaps conceive, that the act of the Executor in the forementioned Caſe, where he only commanded *I S* to take goods of the Teſtators out of a ſtrangers hands, was no Adminiſtration: & it is true, that in that Book it is paſſed in ſilence, & not expreſly ſaid to be an adminiſtration.

But the Lord *Dyer* in the Caſe of *Greisbrooke* and *Fox*, ſpeaking of that Caſe

A being Executor did Adminiſter, and yet would not prove the *Will*. *B.* tooke Adminiſtration, and being ſued for debt, did plead the matter *ſupra*, and was held a good plea; and it was found for him before. Juſt. *Dotheridge ad Oz. in a ſtat. 2. Carol. reg.* 36 H. 6. 7.

Case, saith expresly, that the Ordinary might there have rejected the Executors refusal; for saith he, when the Executor had once intermedled, he should not have been suffered to refuse; so as hee doth cleerly admit, that to have been an Administration. And elsewhere it is held, that if an Executor take goods of the Testator, and convert them to his own use, this is an Administration; yea if he do but take them into his hands, say some, without converting of them; If the wife take more apparel of her own then is necessary, this is an Administration, as the Book admits; but if by the assent or delivery of the Executor, it is not. More clearly, if one do either pay debts of the Testator, or receive debts, or make acquittances for them, or demand the Testators debts as Executor; or give away goods which were the Testators, or deliver money of the Testators for Fees about proving the Will: all these be full and clear Administrations as Executor. But saith *Fitzherb.* if hee only lay out his own mony for Fees, this is no Administration; so saith *Frowick*, if he pay debts with his own money; and if he do it about the Funerals. But some dif-

20 Ed. 4. 17. & 21. E. 4.5.

21 Ed. 4. 5 21 H.6.19. 20. 33 H. 6 31 8. 1 El Dy. 166 13. Ed. 3. Exec. 91 3.4. Ma. Dy. 1.35. 26 H. 8.7.8. 20. H. 7 Kelw. 63 21 Ed. 4.5 20 H.7.f.5

difference may be between acts done by one named Executor, and by a ſtranger, *viz.* to make him an Executor of his own wrong, whereof we ſhall ſpeak after, not in this place. If one being ſued as Executor, take it upon him, and plead in Bar as an Executor, this is an Adminiſtration. 9 Ed. 4. 12. 13. 33. H. 6. 31 a.

Of the force and effect of refuſal.

AS to the third Point, *viz.* the force or effect of Refuſal. Firſt, it is clear that if there be but one Executor, and he doe refuſe, or being many, if they doe all refuſe, then is the party dead Inteſtate, and Adminiſtration is to be committed with the Will annexed, as is before ſaid; nor can any after meddle as Executors. But in caſe there be divers Executors, *viz.* *A B* and *C*, and *A* onely refuſeth, and the Will is proved by the others, there *A* continueth Executor, notwithſtanding his refuſal, ſo as he ſtill may releaſe debts of the Teſtator, and debts owing by the Teſtator may be releaſed to him; yea, if Suit be to be had by or againſt the Executors, it ſhall not be in the name of *B* and *C* only; but *A* alſo muſt be named as a Plaintiffe or Defendant, Cook l. 5. f. 28. Com. 18. E. 2. Bro. 8. 37. 22 Ed. 3. 19. 15. Ed. 3. Exec. 8. 41 Ed. 3. f. 22. 21 Ed. 4 fol. 24.

fendant, elſe the Action may be ove
thrown. For the Will being proved,
the Executors therein named, ſtand an
continue Executors, notwithſtandin
any of their refuſal; as it was reſolved
the latter end of the Late Queens time
according to divers former reſolution
And therefore this Executor which hath
refuſed, may afterwards Adminiſter at hi
43 El. Co. 9. fol. 36, 37. pleaſure, and intermeddle with the good
as well as the others: yet ſaith *Broo*
Chief Juſtice, after the death of h
Companion he cannot ſo doe, but the
the Executor of him who proved, is on
ly to Adminiſter, *Quod non eſt Lex*
There may be ſome difference betwee
4 & 5 Ph. & Ma. Dy. 169 c. 6. contra 21 E. 4. 23, 24. Suits by Executors, and Suits againſt Ex
ecutors; for when they themſelves ſue
they being privy to the Will, and having
the Cuſtody of it, muſt bring their Acti
on in the name of all the Executors, ac
cording to the Will; but he that is to
bring an Action againſt them, need not
perhaps take notice of more Executors,
than thoſe that have proved the Will, or
otherwiſe do Adminiſter: for it is no
good plea for themſelves in an Action a
gainſt them, to ſay there is another Exe
cutor, without ſaying alſo that he hath

Admini-

Administred, as it seemeth by divers Books. Nay one book in the time of *Hen.*8. goeth further, *viz.* that if the suit be brought against all, yet one of them not intermedling with the proving of the Will, may plead that he was never Executor, nor Administred as Executor. By this it should seem, that Executors refusing (I mean all of them, so as no Will is proved) they in an Action against them, may say, that they were never Executors; but me thinks they should not so plead, but shew the special matter, as was done in the time of *Edward* the fourth.

33 H. 6. 38 a Co. 9. 37. b 32 Hen. 6 25. 27 H 8. 11, per totam curiam.

As for relation, I wil forbear to speak, till I come to proving, for that *Probate*, and Refusal stand in the same state, as touching Relation.

9 Ed. 4. 33 Co. 9 f. 36

CHAP. IV.

Of proving Wills.

NOw let us see touching the *Probate* of Wils, What is considerable; and therein of these three or four parts;

1. *Where and before whom, and how the proofe must be.*

2. *What*

2. *What shall be* Bona notabilia, *to int*
to Probate.
3. *What force or validity, either a righ*
erroneous Probate *hath.*
4. *What relation either Probate or Ref*
sall hath.

As touching the first point, *viz.* Ho
and where, and before whom Wills a
to be proved, briefly thus;

The proving is in the Spiritual Cour
yet in some Mannors by Prescriptio
Wills are to be proved before the Ste
ard, though no Lands thereby passe,
appears by divers Books: and in the M
nor of *Maunsfield* is this Prescription
and in others, whereof *Tremaile* w
Steward in King *Richard* the third h
time, as he declared: and the like I m
tell of my own knowledge, touching th
Manors of *Cowly* and *Caversham* in th
County of *Oxford*, where I have kep
the Courts for the Lord Vicount *Wa*
lingford, and found it in present and fre
quent use. And it is said by the Judge
in the time of King *Henry* 7. that th
proving of Wills in the Court Spiritua
is not ancient, but of later time. Yet
it is acknowledged by *Linwood* the Dea
of the Arches, that it pertains not to th
Spiri

2 R. 3. Fitzh. 4 Co. lib. 9 fo. 43.

11 H. 7. 12

spiritual Court of Common right; nor
so in use in other Kingdomes. The
eason why the Law of *England* hath Plow. com.
erein given way to the Ordinary, and 279.
Court Spiritual, is said by *Walsh* in *Gries-*
wak and *Foxes* Case, to be the piety
nd integrity which is presumed to be in
hose of that Function, having charge
f soules. Indeed they are, as it seems
o me, Executors of the new Testament; or
ast Will and Testament of Jesus Christ;
whereby great Legacies and Gifts are
iven to men, and by Pastors to be dis-
ensed and distributed: of which di-
tributers, it is required, as St. *Paul* saith, 1 Cor. 4.2.
That they be found Faithful. And happy Acts 20.27
are they, who with him can plead *Plene*
Administravit, *viz.* that they have fully
administred, as he did, much depen-
ding thereupon, *viz.* Gods honour, the
blessing, prosperity, and safety of the
Country, the Piety, Justice, Conscience,
Contentation and Salvation of men. As
for Wills proved in *London* and *Oxford*,
before the Major, that is only in respect
of the Burgages within those places de-
visable; but they were to bee proved
also before the Ordinaries, in respect of
the goods, and there only where no lands
bequeathed.

The

The proving then is to be before th
Ordinary, General, Particular or Speci
by General I mean the *Metropolitan* o
Arch-Bishop, before whom it is to b
proved; in case the Testator have good
valuable, called *bona Notabilia*, in diver
Diocesses, whereof he is Superior.

Vide fol. proxim. If *Bona Notab.* both in *Canterbury* and *York*.

Of Bona Natabilia.

WHat shall be said to be *bona n*
tabilia, is considerable, for ther
about hath been much diversity of o
pinion: Some holding, that they mu
be of forty shillings value, some fi
pound, some ten pound; yea some, th
the value of a penny sufficeth to draw
to the Arch-Bishop, from the particul
Bishop. But that difference of opinion
conceive to be now cleared, by a C
non made in the first year of K. *Char*
his Reign, at a Convocation then held
whereby it is established, that five pou
shall be the sum or value of *bona Notab*
lia; yet therein is this *Proviso*, that whe
by Composition or Custome in any Di
cesses, *bona Notabilia* are rated at a
greater sum, the same shall continue n
altered. It is likewise thereby provide
that if any man dye in *Itinere, viz.* in h
journ

Canon 92, 93.

journy or travel, the goods which her then hath about him shall not cause that Administration shall be committed, or the Will proved before the *Metropolitan*.

Having considered of the value: now another Point observable is, what things shall be said to bee *bona Notabilia*. And as to that, debts owing to the Testator, are *bona Notabilia*, as well as goods in possession, their value being answerable; yet I think, if the *Penal* sum of the Bond be but five pound for payment of a lesse summe, although the Bond be forfeited; yet in the Spiritual Court, where respect to Conscience suppresseth the favouring of Executors; this will not bee taken to be *bona Notabilia*, *viz.* of five pound value, although in Law, the whole *Penal* summe be a duty. But if the debt be five pound or more, though it bee desperate or due from the King, against whom no Suit can be, but only by petition, yet this will stand for, and as *bona Notabilia*, as I take it, in the Court Spiritual, though thereabout I can but conjecture, since the Rules of our Law determine it not. And this Point touching the Kings being debtor, I finde debated

31 Eliz. ted in the late Queenes time, but no
resolved, so farre as I finde; but the
Popham, at the bar urged, that no de
should be *Bona Notabilia*; and if
should, yet not such, for which no rem
dy by suite, as in that Case, the Quee
being debtor. Yet a further Questio
Locall, is touching these debts, or thin
in Action, in what place or Dioces
they shall be said to be, as *Bona Note-*
Goods considerable, or conspicuous *bilia*, *viz.* whether in the place wher
the debtors bee, or where the Oblig
tion, or other specialties be. And as t
this the Law hath been taken, that be
cause the persons of the debtors b
moveable, passant, and transitory; there
fore these debts shall be said to be, an
to make *bona Notabilia* where the Bon
or other Specialties be, and not wher
the debtors inhabit and dwel: and
was it not long since conceived by Justic
Hil. 39 Eliz. *Walmsley*, and Justice *Beaumont* in on
M. Com. Da. Vide 13 *Pretimans* Case, no other contradictio
& 14 Eliz. it. Herein therefore many are mista
Dy. 305. ken, who only in respect that the per
sons of the debtors do dwel in forrain
Dioceses, other then the places of th
death of the Testator, or where his othe
goods were, do take Administration i

the

he prerogative Court, though the ſpeci-
lties remained where the party died, or
is goods reſidue, were. But in caſe the
debts be only by Contract without Spe-
ialty, then indeed they are to be eſteem-
d *Bona Notabilia* there, and in that place
where the debtor is, as the ſaid Judges
ell conceived the difference. But in
aſe Land be given to Executors for pay-
ent of Debts or Legacies, this ſhall
ot be *Bona Notabilia*, as I take it, though
t be Aſſets.

Of the validity and invalidity of Probates.

AS to the third Point, we will firſt ſee
of what validity an erroneous
roof is, and thereabout we ſhall find
his difference: admitting that one hath
ot *Bona Notabilia* in divers Dioceſſes,
o as of right, the proving of the Will
ppertaineth not to the *Metropolitan*,
nd yet the Will is proved before him;
his is not meerly void, but ſtands in
orce till it be reverſed by ſome ſen-
ence upon appeal, as was reſolved be- 11 Eliz.
ween *Vear* and *Jeoffryes*, in the late Qu.
ime. But on the other ſide, in Caſe one
ave *Bona Notabilia* in divers Dioceſſes

or a peculiar and a Dioceſſe, and yet the Will is proved before the particular Biſhop, within whoſe Dioceſſe part of the goods are; this is meerly and utterly void, without any reverſal. So alſo of proving in ſome peculiar. And in Caſe one have *bona Notabilia*, both in the Dioceſs of *Canterbury*, and in the Dioceſs of *York*; the Will muſt be proved either before both *Metropolitans*, if within each of their juriſdictions there be *bona Notabilia* in divers Dioceſſes; or elſe, as I take it, if there ſo be not in any of the places, then before the particular Biſhops in thoſe ſeveral Dioceſſes where the goods are. Or if within the one juriſdiction *Metropolitan* the Teſtator had goods in divers Dioceſſes, and in the other but in one Dioceſs; then in the one place is the Will to be proved before the Arch-biſhop, and in the other place before the particular Biſhop, as I conceive. And ſo alſo of peculiar juriſdictions. And in ſome places Arch-Deacons have peculiar, or juriſdiction ordinary, and power to take *Probate* of Wills and grant Adminiſtrations. But where any like error or miſproving is in theſe reſpects, it is cauſe of reverſal or of

nullity.

nullity, according to the former difference; so also, if there be falshood in the proof, were it *Communi forma*, that is, without witnesses, or by examination of witnesses, yet may it in the Spirituall Court be undone; if either disproof can be made, or proof of revocation of that Will once made, or of the making of a latter.

Now, yet admitting the Will true and right, and also rightly proved; let us yet see the force and strength of the proof, or Will so proved. It being under the Seal of the Ordinary, cannot be denied, saith one Book, to wit, whether this shewed forth, be a Will proved or not, no, though the proof be but indorsed on the back, *viz.* that it is so proved, saith the Book: but notwithstanding the Defendant so sued, may deny that the Plaintiffe is Executor, as not being concluded nor estopped by the *Probate* so to say. And the reason is, because the Seal of the Ordinary is but matter in fact, and not matter of Record; nor are the sentences of divorce, and the like, in the Spiritual Court, Judgments, or matters of Record; as hath been often held.

9 Ed. 4. 47
22 Ed. 4. 50
22 H. 6. 52

Plow. com. 232. 44 Ed. 3. 32. 19 Ass. p. 2.

Of the Relation of Probate *and* Refusal.

Plow. com. 281. a. 283

AS for this last Point, both the Proving and the Refusal shall have Relation to the death of the Testator, as I take it, to divers purposes So as to the proving, saith the Lord *Dyer* expresly and confidently in *Greisbrook* and *Foxes* case and the resolution also of the Case proves it. For there Administration being committed before any Will proved or notified to the Ordinary, as it should seem, the Administrator sold some of the goods to *I S.* and after the Executors (proving the Will) brought an Action of *Detinue* for those goods against *I S.* who pleaded this Administration and sale, and thereupon the Executor demurred, and Judgment was given for him, as having by the proving of the Will, disproved the Administration *ab initio*: but it is true, that judgment was given only by two Judges; one being absent, and the other dissenting in opinion; yet I think it was right, and according to Law, and that Refusal shal have the like relation; else could not the Administration relate to the death of the Intestate, as

18 H. 6. 22 2. 9. E. 4. 33 47. Not to make good a Release made before Co. lit. 5. 28.

it doth to ſome purpoſes, expreſſed in diversbooks, *viz.* to have an Action of Treſpaſſe for goods taken before Adminiſtration committed, and to have a rent growing payable in that meantime, &c. 39 H. 6.8 2 Ma. Dy. 80.

What Fees to be paid upon *Probate*, or for Copies of Wills, or Inventories.

Per Stat. 21. Hen. 8. Cap. 5.

1. *Where the goods amount not to above five pound, only ſix pence to the Scribe.*
2. *Where they be above five pound, but under forty pound,* two s. *ſix* d. *to the* BB. *twelve pence to the Scribe.*
3. *Where above forty pound, to be taken but* two s. *ſix* d. *to the* BB. *two* s. *ſix* d *to the Scribe, or* 1 d. *for each ten lines of ten inches long, at the Scribes choice.*

THeſe Summes are to ſatisfie, both for Proving, Regiſtring, Sealing, Writing, Praiſing, making of Inventories, giving Acquittances, Fines, and all other things concerning the ſame.

Where Land is given to be ſold, neither

the money raiſed, nor the profits thereof ſhall be accounted as any of the Teſtators goods or chattels, ſaith the Statute.

Note, that the Will is to be brought with wax thereunto ready to be ſealed, and proof to be made of the Will, according to common Cuſtome.

For making the Inventory, the Executor is to take, or call to him two Creditors or Legatees of the Teſtator, and do it in their preſence; or in their abſence or refuſal, two honeſt perſons being the next of his kinne; or in their default, two other honeſt perſons.

The Inventory is to be indented, and one part left with the Ordinary, and the other to remain with the Executor.

The Executor is to make oath for the truth of it.

For a Copy deſired by any, either of a Will or Inventory, no more is to be paid than before is allowed for the Regiſtring, with the like election to the Scribe, or Regiſter as is aboveſaid.

Maſter *Swinburne* ſaith, that an Executor is to ſweare, and if it ſhould be thought fit, to be bound to make a true account when he ſhall be thereunto lawfull

fully called by the Ordinary: Of this account see in *page* 274. And of accounting, some Books of the Common Law make mention, as 13 *Edw.* the third *Fitzh. Exec.* 91. Where *Trew* saith, that of a thing in action, no account shal be before the Ordinary; but *Parn* seemes of a contrary opinion. And elsewhere it is said, that where a debtor is made Executor to the Debtee, he shall yet account before the Ordinary for this debt; yea as of mony in possession, saith one which others denied.

An Executor by wrong shal be drawn to account before the Ordinary, saith *Moyle* Justice. But saith *S. Gawen*, hee may not force any to account against the Order of the Common Law; (not shewing what that is.) And *temp. Edw.* the 4. it is said, at least by the Reporter, that after the Will proved, the Ordinary hath no more to do; *quod non credo.*

Also of the oath of an Executor, divers bookes tell, but not to such purpose as *Swinb.* but truely to performe the Will.

See also 31 H. 3 cap. 11. An Administrator shal account as an Executor. *Fitzh. Ex.* 91. & 837. vid. 18 E. 2. tit. Brief. 48 E. 3. 14. 15. Of a duty resting in account, it is said the Legatee shall have remedie by account in the Spiritual Court. 18 Ed. 4. f. 3. *Moyle.* 4 H. 7. 15 *per Wood.* 9 Ed. 4. 47 *Dodr. & Stu.* 78 4. 21 E. 4. 22 *Plow. com.* 544. 4 H. 7 15 *Keilw.* 64 4.

CHAP.

CHAP. V.

What things shall come unto Executors, and be Assets in their hands, and what not.

THe things which shal come to Executors, are of great multiplicity, and would make a large and confused heap, if tied together in one bundle or lumpe. I will therefore divide and sort them out in parts, after the best manner I can. First, we wil divide them into things possessory, or actually in the Testator, and things in action, or not actually in the Testator. Secondly, the possessory into chattels, real and personal, or (as some lesse properly expres it) moveable and immoveable.

Of Chattels real possessorie.

THese may be divided into two kinds, *viz.* living, and not living; the living are not many and various. 1. The wardship of the body of another, be it by reason of a tenure of the present owner, or by Assignment from the King, or other Lord of whom the tenure was, is

a

a Chattel real, not perſonal, though it be an intereſt in the perſon of another; but it is in reſpect of a tenure of Land, or other hereditament, and is for yeares, viz. during the minority, or till marriage had, and ſo is real. Next, a Villen for years (as by Grant for a terme from him that had the Inheritance) is a Chattel real. As for an Apprentice, for yeares, it is by Cuſtome, as I take it, that he goeth, or is derived to Executors: but for reaſon after ſhewed, I thinke this Intereſt be not in the reality, but in the perſonality rather. So of a debtor in Execution for debt, the intereſt in him, or perhaps more properly in his liberty, is not, as I conceive (for reaſons which after I ſhall expreſſe) a real, but a perſonal Chattel. The like Law of a Priſoner taken in the Warres. As for Fiſhes in a Pond, Conies in a Warren, Deere in a Parke, Pigeons in a Dove-houſe, where the Teſtator had the Inheritance, or but for life, in the Pond, Warren, Parke, & Dove-houſe, they are not Chattels at all, nor to goe to the Executors, but to the Heire with the Inheritance. If the Teſtator were but a Termer, they are to goe to the Executor, but as acceſſary Chattels, following

lowing the state of their principal, viz. the Warren, Park, Dove house, Pond, &c.

The real Chattels, not living, are either in Houses or Lands most usually, and that three wayes. First, by Lease for years. Secondly, by Wardship of Land held by Knights-Service. Thirdly, by extent upon Judgments, Statutes, or Recognizances; or in things issuing out of Houses or Lands, as Rents, Commons, Estovers, or such like. But where an Inheritor reserves a Rent upon a Lease for years, this shall not goe to the Executor, but to the Heire, with the Reversion, other then Arrerages of it behind at the death of the Testator. Also Commons, Corodies for years, Advowsons, Tythes, Fairs, Markets, Profits of Leets, and such like, which the Testator had for yeers, all which may accrue any of these wayes, as the first, are Chattels Reall. Yea, one simple presentation to a Church, upon the next avoidance, is a Reall, and not Personal Chattel, before it come to bee void, and what then it is, we shall after shew. And the title accrued to the Crowne, upon attainder of felony, where the party held not of the King, *viz.* the *Annum, diem*

&

& *Vastum*, that is, power not onely to take the profits for a year, but to waste and demolish Houses, and to extirpate and eradicate Trees and Woods, is but a Chattel, and therefore though granted to one and his Heires by the King, yet shall goe to the Executor, and not to the Heire. Temp. R. 1. Assize 124 Fitzh.

Some doubtfull, or lesse cleer Cases, touching Chattels Reall.

First, where we speak of Wardship, it is not to be understood of Wardship by reason of Soccage tenure, for that goeth not to the Executor, but he shall be next Guardian, who now after the death of the first Guardian, shall be next of Kinne, if the Ward continue under fourteen years old, else he is out of Wardship. Secondly, if one have a Lease for three lives to him and his Assignes, this is no Chattel, nor shall goe to the Executor, nor to the Heire, but to him who first entere, and claims it as an Occupant, if no Assignement be in the life of the Lessee made: Contrarily, of a Lease for many years, if three, or more or lesse, so long live, this is a Chattel, and shal go to the Executor. So an extent 37 Ass. 5 11.

upon

upon a Statute, yet it is delivered to the party as a Freehold, *viz. Ut liberum tenementum*; but that onely makes it to be *quasi liberum tenementum*, as to the maintaining of an Assize, if wrongfully put out. Where one is seised in the right of his Wife, of Land, or other Hereditament, and is attainted of treason or felony, the profit thereof accrued unto the Crowne, is but a Chattel, and though the King grant it to one and his Heires, yet it shall goe to his Executors. And if one, having a Lease for many yeares, *viz.* 100. 500. or more, or lesse, and doth devise and bequeath the same to *A*, and the Heires males of his body, and for want of such issue, to *B* and the Heires males of his body, and dyeth, having issue a Sonne, the terme shall not goe to his Sonne, but to his Executor or Administrator, for it cannot be made a matter of Inheritance; so if *A* had died without issue male, the terme should not have gone or remained to *B*, but to the Executor or Administrator of *A*, as was lately adjudged in the Exchequer, betweene Sir *Robert Lewknor*, and Mistris *Hammond*. So of an advowson, or any other hereditament, granted or devised to one

4. E. 3. Ass. 166. Bro. Chat. 15.

and

and his Heires for 100. yeares; or if such a termer grant a Rent out of the Land to *A* and his Heires, or the Heires, or Heires, males of his body, yet shall the same goe to the Executor, and not to any Heir; for it being derived out of a Chattel cannot be any Freehold or Inheritance, but is it self a meere Chattel. *Partus sequitur ventrem.*

39. E. 3. 37. So *Marvon*, if granted for life, is but a chattel, *Plow. com.* 524.

Of Chattels Personal.

PErsonal Chattels, or goods moveable, are also in like manner to be divided into quicke or dead. The quicke are Chattel of all kindes, as Seepe, Horses, Kine, Bullocks, Swine, Goates, Geese, Duckes, Poultry, &c. There may be also in living Creatures reasonable an Interest as in a Chattel personal, as in the person of a man taken in execution for debt. And this I hold to be in nature, not a Real, but a Personal Chattel (as before was touched;) for that debt is the root of it, and the body is but a pledge or gage, dischargeable instantly upon payment, release, or other discharge of the debt. Like Law of a Prisoner taken in the Wars; for thereof and there-

Ns. ne. br. 88. Reg. e. pag. f. 103. There is mentioned that the prisoner was to have 150 l. for his ransom. Bro. ne. ca. 295 & tit. Property. 38

therein, as in a Chattel, hath the p[illegible] a legal interest: as appears by a Writ [illegible] Trespasse in that Register, for taking [illegible] way a Prisoner, *viz.* *Quare quendam S[illegible]tum Prisonarium suum cepit, &c.* A[illegible] note lately, *viz.* In the time of King *He[illegible]* the 8. the King himself, upon the wi[illegible]ning of *Bullen* bought divers Prisone[illegible] of his Subjects. And by a Statute in th[illegible] beginning of *Hen.* the 6. his time, th[illegible] Interest in a Prisoner is mentioned as va[illegible]luable, and coming from one Kin[illegible] unto another; therefore doubtlesse sha[illegible]

1. H. 6. c. 5. goe from Testator to Executor by death and not be infranchised or freed thereby. The interest which one hath in an Apprentice, I take to be rather Personall than Reall, though for years, because not springing out of any Reall roote, as Wardship, and Villenage doe; but out of a meer contract. As for a Servant whose Master is dead, doubtlesse hee is legally discharged, and is not Servant either to Heire or Executor; but meete and honest it is, that one of them continue him in service till a fit time of providing for him a new Master; and fit for him, not to depart suddenly.

Now for things personal without life;

These

these are evident, *viz.* all Houſhold-
ſtuffe, Implements and Utenſils, Money,
Plate, Jewels, Corn, Pulſe, Hay, Wood fel-
led and ſevered from the ground, Wares,
Merchandize, Carts, Plows, Coaches,
Saddles, and ſuch like moveable things.

*More doubtful Caſes touching things perſo-
nal.*

FIrſt touching things living: If the Teſtator had any tame Pigeons, or Deer, or Conies, or Feſants, or Partridges, theſe all as well as Chickens ſhall go to the Executors; ſo though not tame, if they were taken and kept alive in any Roome, Cage, or like Receptacle, as Feſants and Partridges often be, ſo fiſh in a Trunk, as alſo young Pigeons, though not tame, being in the Dovehouſe, not able to flie out; yet their Dams, the old ones, ſhall go to the Heir with the Dovehouſe. And if the Teſtator had any reclaimed Hawkes, they alſo as Chattels Perſonal ſhall goe to the Executor, becauſe they are things commonly vendible. And whereas Hounds, Greyhounds and Spaniels, bee not ſo commonly bought and ſold, nor ſo anciently have been, yet are they now growne to bee

10 E 4. 14.
15. Come of wild ones
22 H. 7
Ke. w. rep. f. 88. 118
Co. 1. l. 11 f. 50. 18. H 8. 2

10 E. 4. 14
15 & 18
E 4. 8
E. 4. 8
So of young Hawkes in the neſt. It is felony to ſteal theſe *Ergo* they be goods.

a Marchandize, and why not? for though they be for the moſt part things of pleaſure, that hindereth not but they may be valuable, as wel as Inſtruments of Muſick, both tending to delight and exhilarate the ſpirits; a cry of Hounds hath to my ſenſe more ſpirit and vivacity then any other Muſick. Adde hereto that there may be ſome profit and advantage gotten by them, both *quoad adeptionem boni, & ademptionem mali*, the getting of ſome good food, and the preſerving of others, as Lambes, Conies, Fiſh, Poultry, by killing Foxes, wild Cats, and others which deſtroy them. And we know that money is recoverable in damages for taking away ſuch, or a Maſtiff ſerving to keep an houſe. So of Ferrets to cath Conies, &c. Therefore they are valuable. But it may perhaps be objected, that none of theſe above are Cattel, and therefore not repleviſable, conſequently no property in them; for where more then one living Cattel is diſtrained, the *replevin* is to be by the name of *Averia*, ſignifying Cattel. For anſwer, not to inſiſt that one may have property in divers things, whereof no *replevin* lieth, as Corn or Hey, not in Sacks nor Carts, mon-

So an Hunters horſe, a Falkoners lewer. *Hares*, Deer, Feſants, Partridges, wild Ducks &c. are good meat.

money not shut in bag, nor box &c. I further say, that even the word *Averia* may be applyed to these, for so I find to Hens & Capons in the book of Entries, *viz.* in the writ of *Curia Claudenda*, where the Plaintiffe complaines of the defendants not making his *Mounds*, *per quod averia ipsius A. viz. Capones, Galline & alia Averia ipsius A.* that is, whereby his Cattel, *viz.* Capons and Hens, and other his Cattell came into the Plaintiffs house and Garden to his damage, &c. And both *Newport* and *Newdigate* hold that a writ of *replevin* lieth of such things; though *Brudenel* were of contrary opinion, yet he also held an action of Trespas maintainable for taking of them, and therefore admitted a valuable property in them. Now come we to things without life, and first to those abroad in the Fields. Put the case that a man dies in *July* (before Harvest I mean) seized for life or in Fee, or Tail, in his own right or his wives, or estated for yeares of Land, in the right of his Wife, being sowne with Corne or any manner of Grain, the common saying is, *Quicquid plantatur solo, solo cedit*; yet this shall goe to the Executor of the husband, and not to the Wife or Heir; Fo. 143. Hen. 8. f.

who shall have the Land, but Hay growing, *viz.* Grasse ready to be cut, Apples, Pears, and other fruit upon the Trees shall go to the Wife; as also if they had been upon a mans owne Land of Inheritance, they should go to the Heire, though the Corn should go to the Executor. The reason of difference is, because this latter comes not meerly from the soil, without the industry and manurance of man as the other doe; and I take Hops, though not sowne, if planted, and Saffron, and Hemp, because sowne, to pertain as Corne to the Executor. All those yet shall passe to one, to whom the Land is sold or conveyed, if not excepted, though never so neer reaping, felling or gathering. But what if the Wife had the Lease for years as Executor to some former Husband or other friend, and the Husband after sowing dies, who then shall have the Corn? Certainly the Corn shall go to the Executor of the last Husband, at least so much as is more then the yeerly value of the Land, or the making it up by addition of other things, for the value is to be Assets for payment of debts & Legacies. Put the case again, that the Husband and Wife were joint-tenants of the land,

and

Rootes of Carrots, Parsneps, Land sowne whereon is ripe Corne.

For he was Tenant for life in effect

and then the very Corn growing ſhal ſurvive to her, together with the Land, and though the Husband ſowed it, yet ſhall it not go to his Executor. Being in conſideration of things growing on the ground, let us not forget to think of Trees ſold by *I S* ſeized of the Inheritance of the Land to *I D* who dieth before felling, this Intereſt is a Chattel which ſhal go to the Executor, and not to the Heir of *I D*. but ſome colour may be, that theſe, becauſe fixed to the ſoile and Free-hold are real Chattels, as the Intereſt in Land is, and not perſonal: So alſo of trees excepted by him who ſelleth the Inheritance of the Land; but in both caſes I conceive this Intereſt to be perſonal, and not real; for that, as it is a propriety of Chattel in the Vendee, or Vendor with exception, it ſtands in conſideration ſevered and abſtracted from the ſoile or ground where the Trees grow, though the Trees be not actually ſevered by the Axe from their mother Earth. But if the Leſſor for yeares or life except the Trees, theſe continue parcell of the Free-hold and Inheritance. And after Corne reaped, and before the Tithe ſet out, the Inheritor of the Tythe dying, I think the

The wife alſo ſhall have convenient apparel. 33 H. 6. 31. 2 Eliz. Dyer

Co. l. 11 f. 48

Executor, and not the Heire, shall have the Tithe after set out.

Now let us come home to the Testators house, and see in and about it some doubt, what pertains to the Heir, and what to the Executor. Question hath been of old, and of late, touching Coppers, Leads, Furnaces, Fats for Dyers or Brewers, Pales, Rayles, Glass in Windows, Tables, Dormants, Wainscots, Doors, Locks, Keyes, and such like, to whom these should goe? whether to the Heire or Executors? And in the latter end of *Henry* the 7. his time, an Executor taking a Furnace which was set in the middle of a house and not fixed to any Wall, the Heir brought an Action of Trespasse against him for so doing, and it was adjudged for the Heir, *viz.* that this was to go as part of the Free-hold and Inheritance to the Heire; and long before in *Edward* the third his time, it was debated whether were waste in a Lessee to remove or take away a Furnace or not: but I find no opinion delivered by the Judges: but in the late Queens time, Justice *Walm* said, that the Lord *Dyers* opinion was that where the Furnace is not fixed to

Of Houses or things about the House.

43 E. 3. 6

31 H 7. f 26

43 E. 3. f. 6

W

Wall, the Lessee might within his terme take it away. Contrarily, if it were fixed to the Wal, for then it strengthneth the house. And yet notwithstanding it might be in the one case so removed by the Lessee, yet is it not there, as he said, a Chattell personall or moveable, so as it is attachable; and there the case being that a Clothier being a Termer of an house, had fixed a Copper to the Wall with Loomes and pricks necessary for his Occupation, a Judgement being had against him, the Sheriffe delivered the Copper in Execution as a Chattel, and after the Lessee tooke it up, and it was taken from him by vertue of the Execution; whereupon hee brought an Action of Trespasse, and by all the Judges, the action was maintainable. And whereas it was found by the Jury, that by the Custom of *Kent*, the Lessee might remove such a Copper; Justice *Beaumond* said, that without any Custome, a Lessee might so do at any time during his terme. But it is to be noted in the said case, that the furnace was by it self delivered as a moveable Chattel, and not as part of the house, for that was not medled withall, nor at all delivered in extent (as

H. 37 Eliz. Austins case.

in the Case between *Miles* and *Pr*
where both house and Copper were de-
vered upon a Statue) the house belike be-
ing held upon such a rack rent, as that the
party did not desire to have it, for he
might have had the whole being a Chat-
tel, and so have used the Copper during
the terme. And as touching all other fixed
things, the Law was taken in the said case
in *Hen.* the 7 his time, to be all one, as in
the case of the Furnace, *viz.* that they
should go to the Heir, save only that for
Glasse in the windows, *Pollard* said it was
otherwise, *viz.* that that should goe to
the Executors, which none there denied.
But since, in the late Queens time it was
otherwise resolved touching glasse, that
it should not go to the Executors, and
the like was there said touching Wain-
scots, and so also by the Lord *Anderson*
in the said case of *Austin*. And touching
Posts fixed, for that they be parcel of the
Freehold, so also of Milstones, Anvills,
Doors, Keyes, Windowes, none of these
be Chattels, but parcel of the Freehold,
or thereto pertaining, therefore not the
Executors.

Co. lib. 4. f. 93. 94.

Things in Gardens.

Now to come to Gardens also:
whereas I before laid down a difference
betwixt

betwixt things ſowed, or not ariſing from the Earth, without manuring, and ſuch as grow of themſelves; It will thence be concluded that the rootes of Carrets, Parſneps, Turneps, Skerrits, and ſuch like, coming and ariſing from yearly ſowing, muſt go to the Executor, and not to the Heir; the caſe being ſo, that the Gardner and Sower had the Inheritance of the Garden or Soile: now though in moſt places this can rarely be a queſtion of value, yet about *London*, and ſome great Towns it may, and therefore not unworthy of a line or two, a thought or two, the rather for that the reaſon of this caſe may give light touching right in other Caſes. And in my opinion, theſe (notwithſtanding there is a ſowing and manurance to generate them, and cauſe their being) ſhal go to the Heire and not to the Executor: my reaſon is, for that the thing of profit is the root which is hidden in the ground, and I hold it no reaſon, nor agreeable to Law, that the Executor ſhould dig and break the ſoil and ground to ſearch for her entrailes; he is to content himſelf with that which is above ground, as Melons of all kinds, and the like, whoſe fruit is above the ground: but

as

as for Artichokes, though the fruit be above the ground, yet I think they have not such yearely setting, or manurance as should sever them in interest from the soyle, therefore they shall goe with it to the Heire.

Let us now consider of things, though not fixed to, yet usually kept in houses, *viz.* writings and evidences, whereabout generally, no doubt can be, but that they follow the interest of the Land, so as if they touch inheritance, they pertaine to the Heire; if but Termes of years, Goods, Chattels, or Debts, they pertaine to the Executor; yea so doe Statutes and Bonds in Law (howsoever otherwise in equity) though they concerne the assurance and enjoying of Inheritance purchased. What if *A* morgage the Inheritance of Lands to *B*, upon condition of redemption by payment of 500. pound to *B*, his Heire, or Executor, and *B* dyeth, the Deeds being delivered into his hands; now the Heire, not the Executor, shall have them; for though the money may be payd to the Executor; yet (meane time) the Land descends to the Heire, nor is there any debt to the Executor, for *A* may choose to pay, or not. Put it

on the other ſide, that the Land had beene ſold for 500. pound, not paid to *A*, but a Condition that if not paid to him, his Heire or Executor, by ſuch a day, then to re-enter; and *A* dieth, here is a debt to the Executor, and no Land deſcended to the Heire of *A*, yet ſhall the Heire have the Deedes, for that a Condition is deſcended to him. Queſtion hath beene touching Boxes and Cheſts, wherein the Evidences concerning Inheritance are; and although the better opinion in our Bookes, doth pitch upon this difference, that where they are ſealed up, they ſhal pertaine to the Heir; otherwiſe, where not ſealed; I cannot conceive that difference to be grounded on good reaſon; but rather thinke that Boxes, which have their very creation to be the houſes or habitations of Deeds, ſhould, as appurtenant to them, goe to the Heire, whether ſealed or not. On the other ſide, Cheſts made for other uſes, *viz.* the keeping of Napery, or Apparel, ſhall not, as I conceive, be taken as appurtenant to Evidences becauſe ſome be in them, for ſo may other things alſo be: Nor as touching them can ſealing be of any effect, but rather locking, and not lock-

41. *E.* 3. 2.
36. *H.* 6. 26.
18. *Ed.* 3. 4.
3. *H.* 7. 15.

Qu. If ſole uſe that way make a difference or not.

locking muſt make the difference touching them, if any difference by incloſure.

CHAP. VI.

Of things not actually in the Teſtator, but accruing to the Executors, by or after the Teſtators death.

THeſe be of divers ſorts, the firſt, and chiefe whereof are things gotten and acquired by Action or Suite. Secondly, by Condition or Covenant without Suite. Thirdly, by Remainder.

Of things in Action.

TO ſpeake firſt of the firſt, it is cleare, that debts due to the Teſtator, be it by Bond, Statute, or Judgement, or for Arrearages of Rent, are not Aſſets to charge the Executor, untill receipt of them; and it is cleere that the Action to recover theſe doth pertain to the Executor, and that the debt and damages recovered ſhall be aſſets to charge the Executor. So alſo of Actions of *Detinue*, and

See Stat. 32. H. 8. cap. 37. Remedy for Rents of Inheritance, or for life.

of

of Covenant for any thing personal, or any Chattel Real, Lease, Wardship or the like. But perhaps some will doubt of Covenant touching Inheritance, *viz.* the assurance of Lands or enjoying thereof, free from this or that incumbrance or the like: Yet even in those cases, if the Covenant were broken in the Testators life time, I thinke cleerely the Action is accrued to the Executor, for that his Testator was to recover damages in the Action of Covenant for that breach, and he being intitled to these damages as principal, and not any accessary thing in that action, the Law hath cast that action upon the Executor. And that is the cause why, if waste be committed in the life of the Lessor by his Lessee, and then the Lessor dyeth, his Heire can have no Action for this waste, *viz.* because he cannot recover the treble damage; so neither can the Executor have it, for that he cannot recover *locum vastatum*, the place wasted, the Inheritance whereof is in the Heir.

A Church of the Testat. Inher. become void in his life, comes to the Exec. as a thing in action; but is not Assets, for not vendible.

That the Executor at the Common Law could not maintain an Action of Trespass for goods of his Testator, taken away in his life time, seems to be implyed by the Statute in the time of K. *Edward* the

11. H. 4. 32. 45. E. 3. 3. No. na. 67. 59. 4. E. 3. a. 7.

And the like given to Executors of Executors *per. stat.* 25. E. 3. c. 5. 17. E. 3. *Fit.* 106.

the third, which gives such action. Yet it seemes that a *Replevin* was maintaineable by the Executor, at least in some cases, for goods taken or distrained in the Testators life time: But in case the distresse were for Rent, or Service, it is said a little after the making of that Statute, that the Lord may not now avow for his Rent, or Service, because his Tenant is dead, but must set forth the matter, and thereupon justifie to excuse himself from answering damages, and the Executor shall by this Action recover the Cattel or Goods, and that by the Common Law, saith the Booke, though the Statute of *Marlebridge* had never beene made, for that the propriety remained in the Testator. Note, it speakes not at all of the said Statute of 4. *Edward* the 3d. But *Newton* in the time of King *Henry* the 6. would have it, that the Executor in that case should not have a *Replevin*, but an Action of Trespasse grounded upon the said Statute, *viz.* 4. *Ed.* 3. Which me thinks cannot be by any meanes, by reason of the Statute of *Marlebridge cap.* 3. *Non ideo puniatur dominus, &c.* for the Executor, as well as his Testator, is thereby restrained, as I thinke, from the Action

c. 21. meant *ut credo.* 21. *H.* 6. 1. but *Markeham è contra*

31. *H.* 8. *ca.* 19. 4. *E.* 3.

on of Trespasse against the Lord. As for that no Avowry can be made upon the Tenant, that is now remedyed by a late Statute; The other Statute hath been taken to extend to other things than goods moveable: for where a Church becoming void, a stranger presented thereunto wrongfully, and the Patron dyed, it was resolved in the late Queenes time, that the Executor might by the equity of the said Statute, maintaine a *Quare impedit*. But whether an Action of Trespasse lyeth for an Executor; against him who spoyled the Testators Corne, Grasse, or Wood growing, hath beene questioned, but no where resolved to my knowledge. I thinke it may lye, with some difference: First, for that the Statute of 4. *Edward* the 3. doth not onely speake of Goods carried away, as limiting the Law to that trespasse soley and particularly, but speakes generally of Trespasse done to Testators; and then brings in that particular of goods, as one Instance. Now there be many cases of instances or ensamples given in acts of Parliament, which yet doe not restraine the remedy or *purview* to that particular, or from extending to other cases of like nature.

The R. of *Covent. and L.* and *Sales* case *M.* 32. & 33. *Eliz. in com. ba.* So of Ravishment. *Dl. gard.* 7. *H.* 4. 2. & 7. *H.* 4. 6. *Ejectt. Firm. & Tild. De clauso fractô* meerely it lyeth not. 11. *H.* 4. 3. This Persian *Just.* did very judiciously urge in *Sales* case *supra*.

ture. Thirdly, the Stat. ſpeaks of treſpaſſes remaining unpuniſhed, which is meant to redreſſe: But it ſhould ſtill leave many unpuniſhed, if it ſhould have no larger extent, then to that one ſingular treſpaſſe, of Goods taken away, *viz.* moveables. Againe, the Teſtator was cleerely intituled to a recovery of damages for this other treſpaſſe, which if he had recovered, ſhould have come to his Executor; Yea the things themſelves, all, if felled in the Teſtators life, and part though not felled, ſhould have come to the Executor; therefore alſo the damages recoverable in lieu thereof, out of which (recovered) the Debts and Legacies of the Teſtator are to be ſatisfied. Beſide, this Action of Treſpaſſe is a thing ſevered from the ſtate of the Land, ſo as if the owner thereof had, after this treſpaſſe done, aliened the Land, yet had not this Action remained to him, as I take it, clearely. And why not as well as where a Treſpaſſe is done upon the Lands of the Leſſee, and then the terme expires, this doubtleſſe doth not take away his Action, nor his Executors. But me thinkes here may be ſome differences probably taken, as firſt, betweene a Treſ-

paſſe

paſſe in deſtroying or taking away Corn growing, and a treſpaſſe in Graſſe or Wood growing: for the firſt being of that nature, as that, though the Owner had a ſtate of Inheritance in the Land whereon it groweth, and ſhould have died before ſeverance and felling, Yet it ſhould have gone to the Executor, and not with the Land to the Heire; therefore doubtleſſe doth the Action for deſtroying or taking away thereof, accrue by the operation of Law to the Executor in lieu of the thing taken or deſtroyed. Otherwiſe, perhaps, of Wood or Graſſe, Which by the Owners death ſhould have gone to the Heire, and not to the Executor. And yet here again another difference mee thinks may be betwixt Graſs and Graſs, *viz.* betwixt that in paſture and that in Meadow, yearely mowed and turned into Hay, nor left to be conſumed by the mouthes of Beaſts, as that growing in Paſture: For as the Law diſtinguiſheth between theſe Soiles, it gives precedency to Meadow and makes it waſte for a Leſſee to plow it up; not ſo for Paſture. Yea, Tithe is paid of Hay, but not of Graſs growing in Paſtures; ſo the Meadow Graſs being in the Owners

purpose and intention, as a thing severed from the soile, should me thinks so be also in the eye and estimation of the Law, and therefore stand in a different state, and account from Pasture Grasse. A third difference may be in the manner of the Trespasse, *viz.* Where the Meadow Grass is eaten up with Cattel by a Trespasser, and where by him mowed and carried away as Hay; for in this latter case an Action of *Traver* and *Conversion* for so many loades of Hay, is doubtlesse maintainable by the Executor, though it should be admitted that in the other case of consumption by the mouthes of Beasts without severance, no Action should be maintainable by the Executor; which yet I admit not, but think the contrary probable. For when Meadow ground, which yearly conceiveth (*Sola sine homine generat herbam*) shall be ready to be delivered of her burden, if a stranger putting in a herd of Cattel, which swallow up, and tread down this fruit of her wombe, before the Mower with his sithe come as a Midwife to help her delivery, if then by the hasty death of the Owner, before Action brought, this great Trespasse should be dispunishable,

At least, me thinks, Action upon the case here and before should bee maintainable.

were

were contrary, as me thinks, to the purpose of the said Statute, and a great defect in the Law. Yet here perhaps touching this, a fourth difference may be, or arise, out of the time of the death of the Owner, *viz.* where he dieth before time of Mowing, and where not; for *Dato*, that in the former case, because, if such destruction or consumption had not beene, yet the Owner dying before severance, this should not have come to the Executor, but have gone with the soyle to the Heire, that therefore the Executor, who is not damnified, should recover no damages; Yet in the other case, the Owner living till after Hay time cleerly passed, *viz.* till the end of *August*, me thinkes now, since this fruite of the Meadows wombe should have been a Chattel severed, had not this Trespasser made unlawful prevention: Therefore the Executor to whom the same should have come, towards the performance of the Will, should have out of the said Statute, an Action and remedy reached unto him to recover recompence in damages for this wrong done in *retardationem Executionis Testamenti*. A fifth and last

difference may perhaps be in the ſtate of the Owner; for *Poſito*, that where the Land is his Free-hold or Copy-hold Inheritance, no Action ſhould be given to his Executor for Wood or Graſs taken or deſtroyed in his life time; yet where hee is but Tenant for yeares, Gardian, or Tenant by extent, ſo as the very ſtate in the Land was to come, and is come to the Executor (together with *Quicquid plantatur ſolo*) me thinks the Executor ſhould have, together with the ſtate in the ſoile, the Action to puniſh the Robber of, or Treſpaſſer upon the ſoile. Thus having ſcanned and ſifted, to the beſt of my ability, all differences and circumſtances of this point, how far I am wide, and wherein right, *Aliorum ſit judicium*, or rather, *Altioris eſto judicii*. But this is clear, that whereſoever Executors do recover any dammages for treſpaſſe, or other wrong done to their Teſtator, the money recovered (at leaſt, if Execution bee had, or mony received) wil be Aſſets in their hands, as wel as debts recovered upon Bonds or Bills, or Lands, by them taken in Extent upon Statutes, Recognizances, or Judgements. Yea, without ever having

3 H 6.3 *Littleton f. 42 a.*

So held in *Sales* caſe of dammages in *Qua. imped.* recovered *contra.* of the preſentment. Releaſing. 13 Ed. 3. Fit. 91.

having these moneys, Executors may make them Assets in their hands, *viz.* by making Releases or Acquittances, or acknowledgement of satisfaction, for this amounteth to a Receipt, and chargeth the Executors towards the Creditors, with the whole penall summe, though haply they receive but part, as the principall, or some like proportion. Therefore, there is great caution to bee used by Executors in this kinde, that unlesse they be sure they have goods sufficient to pay all debts and Legacies, they make no Release, Acquittance, or acknowledgement of satisfaction, for more then they do receive, be it debt or damages. And the like caution to be used by them, touching submission of debts or damages, to arbitrement, wherby discharges of the same may grow; for the submission to the Arbitrement, being their voluntary act, although the Arbitrators by their judgement do discharge the debt or dammage in part or in whole, yet shall the Creditors have like remedy thereupon against the Executors, as if they had released, or, which is more, received the same.

Error 11 H 4. 65 46 E 23 Yet upon a verdict in *Q. a. imm.* the *Wife*, not the Executor of Husband did seize. 9 H. 6. c. 4.

Other Actions there be of discharge,

which as the Teſtator himſelf in his life time might have had, ſo may his Executor after his death, *viz.* Writs of Error, Attaint, Diſceyt, *Audita Querela*, *Identitate nominis*. But this laſt is given by Statute. Whatſoever is regained by any of theſe wayes, as unduely loſt by the Teſtator, ſhall alſo be Aſſets.

Special caſes pertinent to the Premiſes.

1. *Chattels come to Executors from the Teſtators, yet not Aſſets.*
2. *Aſſets which be no Chattels.*
3. *Things in Action, and in the perſonalty turned into Chattels Real,* & è contra.

AS to the firſt, I exemplifie thus, *A* makes *B* his Executor, and dies; *B* makes *C* his Executor, and dies. The Goods left by *A* to *B* as Executor, far exceed his Debts, and Legacies; or let us ſuppoſe no debts nor Legacies of *A*, and that *B* dieth much in debt, above the Goods he leaveth, and did make no alteration of the property of the goods of *A*, but meerly left them to *C* his Executor. Now ſhal not the Goods which came

came to *B* as Executor of *A*, and so from *B* to *C* be liable in Law to pay the debts of *B*. yet in Conscience me thinks they should, and that *C* should not receive them to his own use, as in Law he may, where *A* left no debts. But if *A* making *B*. Executor, did also by his Will give him all his goods; and hee in his life time made election to have them as Legatee, or by his Will, did so dispose of them, or appoint them to goe, as the goods he had as executor, they could not be otherwise given or disposed; Now by this election they were altered in property from being his as Executor, and so as his owne goods should bee liable to his debts. But things in action could not be so given or disposed, *viz.* Debts, &c. yet if *D* were indebted to *A* one hundred pound, and *B* his Executor took new Bond of him, or another for it, giving up the old Bond, now was it become his owne debt, and so shall stand in his Executor.

Another instance of this thus; If *A* Patron of the Church of *D* grant to *B*. the next avoidance, the Church becomes void, *A* dies before he presents, his Executor presents, and hath the benefit

Or if a stranger usurp in his life, and he dying, his Executor

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of preferring his ſonne or friend, yet ſhal this make no Aſſets in his hands for payment of debts; for that he could not lawfully take mony to preſent. But if *B* had died before the Church had become void; Then becauſe the Executor might lawfully have ſold it, the value ſhould be Aſſets in his hands, as I conceive, except perhaps the incumbent had died ſo haſtily after *B.* that the Executor had not time convenient to find out a chapman, and to ſell it.

recovers in a *Qua. imp.* as by *Sales* was done *infra Mich.* 32 & 33 Eliz. So held in Sales Caſe, in com. ba. *Vendere jus poteſt, cum res ipſa prius.*

If in the other Caſe a ſtranger had preſented and got his Clark admitted, and the Executors of *B* had in a *Qua. Imp.* recovered damages, the money ſo recovered ſhould have beene Aſſets. Thus much of the firſt, *viz.* that ſome things of the nature of Chattels may come to Executors, and yet not be Aſſets.

Touching the ſecond, *viz.* that ſome things may be Aſſets in the hands of Executors, which yet are no Chattels; I ſhall give but two inſtances. Firſt, where a man leaveth a Villen for yeares to his Executors, and the Villen purchaſeth Land in Fee-ſimple, and the Executor entreth into the Land; now hath he Fee-ſimple therein; and this Land is

22 H.8. Br. *Villenage* 46. If hee die, how ſhall this be Aſſets in the Heires.

Aſſets

Assets for payment of the Testators debts. So, if a man by his Will give Lands in Fee to his Executors, to bee sold for performance of his Will; These (before the money thereby raised) are Assets, both for payment of debts, and of Legacies; But if the Lands had beene given to be sold onely for payment of debts, they should onely bee Assets for that purpose, and not for payment of Legacies: and so, if it were expressed to be for payment of Legacies singularly, this should not be Assets for debts, as I take it. For since these are not Assets of their own nature, but so made by the Will and disposition of the Testator; me thinkes they cannot be otherwise, nor farther Assets than as the Testator hath willed and disposed; but though Lands thus given were Assets before the *Stat.* 21. *Hen.* 8. *cap.* 5. Yet how can it be so, since the very words of the Statute be, that if one will by his Testament or last Will, any Lands, &c. to be sold, neither the mony therof coming, nor the profits taken, shall be accounted as any of the goods or chattels of the Testators; which I conceive to be all one, as to say, that they should not be Assets; for

3 H. 63. & so 2 H 4. 21 If by Feoffment *per Markam cap. Just. cont. Rick. hill.*

See 9 H. Dy. 264.

for when an Executor denyeth himselfe
9. H. D. 264. to have Assets, the forme of his plea is,
14. H. D. 31. *Quod nulla habet bona nec cattalla*, &c.
Yet since that Statute, *viz.* in the late Queenes time, the Law was twice admitted, or conceived still to be according to the third of *Hen.* 6. *viz.* that the Land devised to be sold, or the money thereof coming, should be Assets. Indeed, in neither of those Bookes is there any mention of the clause in the said Statute; and it is possible that it might be forgotten, as in other Cases sometime hath hath happened. But casting about how to reconcile those Bookes with the said Statute, and not to suppose the same forgotten at both times, both at the Barre, and Bench (though being but a short clause in the middle of a large Statute to other purpose, it might wel so have been) at the last, though not hastily, I grew to conceive, that the said clause being in an Act which limiteth the Fees of Ordinaries, and their Scribes, according to the value of the goods of the deceased, and then bringeth in this clause, that the Lands willed to be sold, shall not be accounted as any of the goods, &c. The Parliament meant therby only to exclude

them

them to this purpose, that they should not be accounted as part of the goods in the valuation, according to which the said Fees were to be rated; and though the words be general, that they shall not be accounted as any of the goods, &c. yet is it the more probable, that the Parliament meant no further then as aforesaid; because that clause after the Fees limited in answerableness to the values, is brought in by a *Proviso, viz.* Provided alwayes, that if the deceased Willed any Lands to be sold, the money nor profits shall not, &c. And thus perhaps it was understood and construed in the said late Queenes time, though no mention be of any remembrance of that clause or provision in either of those Cases reported by the Lord *Dyer*.

As for the third, *viz.* the changing of things out of the personalty, into the realty, *& è contra*, I shew it thus: If a debt were due to the Executor, as Executor, by Statute, Recognizance, or Judgement, and he sue Execution, and have Land of the debtors in extent: now is the personal duty turned into a chattel real. On the other side, if such an estate by extent, or a Lease for yeares mortga-

mortgaged come to an Executor, and the debtor or mortgager payeth the money due; now are these real chattels turned into Assets personal.

Another special Case of equity opposing Law.

IF *A* be bound to *B* by Bond, Statute, or Recognizance for assurance of Land, *B* dyeth, and the Land descends to his heire; or be it that *B* sold the Land to *C*, and assigned to him the Bond, Statute, &c. yet must the Sute, or taking out be in the name of the Executor of *B*, and neither of the Heir, nor Assignee. And that which is recovered, or gotten in extent, will be Assets in Law to charge the Executor, as I take it; yet in equity it pertaines to the Heire or Assignee. *Quære*, if the Executor meddle not, but onely suffer his name to be used.

Of things come to Executors by Condition.

FIrst, we will consider of Conditions bringing back to Executors goods, or chattels granted away by their Testators. Touching which, there is no doubt, but if the Condition be any other than for payment of money, or other things va-

valuable by the Teſtator, or his Executor, the chattel returning to the Executor is Aſſets in his hands: as put the Caſe a Leaſe for yeares, Horſes, Sheepe, Plate, or other Chattel, were granted by the Teſtator to *A*, upon condition that if *A* did not pay ſuch a ſumme of money, or doe ſuch other Act as the Teſtator appointeth, and this condition is not performed after the Teſtators death, now is the chattel come backe to the Executor, and his Aſſets. But the queſtion hath beene (and perhaps may be) where the condition is, that the Teſtator or his Executors ſhall pay the money to make void the Grant, and accordingly, the Executor after the Teſtators death payeth the ſumme out of his owne purſe, not having any money of the Teſtators in his hands: in this Caſe coming in queſtion, *tempore Hen.* It was reſolved at the laſt, that this redeemed chattel ſhould not be Aſſets, but be to the Executor as his owne proper goods, though at the firſt, three Judges were of contrary opinion, *viz.* that the goods redeemed ſhould be in the Executor, as goods of the Teſtator. And truely I muſt confeſs that I cannot yet finde good ſatisfaction

Note Pill.

21. *Hen.* 7.

on in that Bookes resolution, except we shall take the Case there to be such as that which is put and reported by the Lord *Dyer*, *tempore Hen.* 8. *viz.* that the money paid for redemption, was as much as the full value of the goods pledged, or mortgaged; or else shall admit the Case to be, that this redemption was not by payment at the day conditioned. As to the first, it were rare, if any should lend money upon a mortgage, where the thing mortgaged is not of better value then the money lent; rare also, that an Executor should take care to redeem with his owne money, that which should yeild no benefit or advantage to him, or his Testator. Let us therefore scanne and examine the Point, since the same may come frequently in use; and this we may the more decently doe, because the Lord *Dyer* in the Margent of the Case by him reported, as aforesaid, saith expresly, that the said other *tem. Hen.* 7. was not at all adjudged, himselfe having viewed the Roll, which he there sets down, and the names of the parties. We will therefore put the Case thus. *A* possessed of a Lease for sixtie yeares, of one hundred pound Land,

Land, mortgageth it for five hundred pound; or he is that the mortgage or pledge be of a Jewel, or peece of Plate for halfe the value, and that before the day limited for payment, and redemption. *A* having made *B* his Executor, dyeth, and *B* at the time and place maketh payment, as was conditioned. Now the queſtion is, whether this Leaſe, Plate, or Jewel, being worth much more than the ſum for which it was mortgaged, ſhall be in him wholly in his owne right, and to his owne uſe, or partly, if not wholly, as Executor to *A*, ſo as to be ſubject to the payment of Debts and Legacies. Here it muſt be clearely admitted, that *B* was inabled to this redemption onely, and meerly by the Condition annexed to the mortgage, or pledging. It muſt alſo be admitted, that this Condition, and the power or intereſt to take benefit thereof to him, came, and was derived onely as Executor of *A*. This being premiſed, it muſt needs follow, (as to me it ſeemes) that the Condition working, and having his operation in the redemption to deſtroy the Grant, mortgage, or pledging, it muſt needs make theſe againe the Teſtators goods, *in ſta-*

tu

in quo prius, and ſo to be in *B* as Executor; ſince in that right onely he was intituled to take benefit of the Condition. For what is it which hindered before this, from being the Teſtators goods? nothing certainely, but onely the force and ſtrength of the mortgage or pledge: Now by the redemption that is become void, and hath loſt its force; therefore the property of theſe things muſt now needs be, as if no ſuch mortgage or pledge had beene, or as if it had at the firſt beene void, and of no force: Thus muſt the Condition worke for him who made it, *viz.* *A* the Teſtator: and thoſe of the contrary opinion in the time of King *Henry* the ſeventh, do yet ſay, that by this redemption the Teſtator is ſo much indebted to the Executor, as he diſburſed for the redemption; which could ſtand with no reaſon, unleſſe by it the property and intereſt ſhould be reduced to the Teſtators behoof. That thus it is, is alſo proved, as to me it ſeems, by the Caſe of mortgage of Inheritance, upon which the Heire making payment, according to the condition, is not now in as a new Purchaſor, but as Heire;

ſo

ſo as he ſhall have his age, and bee in Ward even for this Land; Yea, it ſhall be Aſſets in his hands, for ſatisfaction of his Fathers, as other Anceſtors debts; which in ſome reſpect is a harder Caſe than that of the Executor, for he hath means to ſatisfie himſelf of the money diſburſed, either out of the thing reedeemed, or other goods of his Teſtotor, but the heire hath no ſuch meanes. Yet it wil be asked how the Executor can be free from miſchiefe, for if this thing redeemed be intire, as the Cup or the Leaſe, the whole will be taken in execution for the Teſtators debt. To admit this, yet here is one cleer way of remedy, *viz.* the Executor may before ſuch execution, ſell the thing, and ſo pay himſelf, and retain the ſurpluſage to the Teſtators uſe, and the like of this is frequent in uſe, *viz.* for Executors to pay off the Teſtators debt with their own mony, and to make themſelves ſatisfaction out of the Teſtators goods. Beſides, it is not impoſſible, that this redeemed thing ſhould be thus in intereſt parted, that anſwerably and proportionably, to the ſum diſburſed for redemption, with reference to the value of the thing redeemed, a moyety

or third part, or three parts thereof should be to the Executor in his own right, as his own proper goods, and the rest in him as Executor. As *posito*, that *A* and *B* were tenants in common of such an entire Chattel: *A* maketh *B* his Executor and dieth. Now hath *B* one moyety as Executor, and another as his own proper, and upon a Judgment against him as Executor, that moyety only which hee hath as Executor, must be taken in execution; and here may be remembred how in execution of a Judgment, or levying of an Amerciament out of an intire Chattell of more value than the sum to be levied, the whole is to be sold, and the surplusage above the debt or Amerciament is to be delivered back to the Owner. For in all this debate we must presume the thing redeemed by the Executor, to be of better value then the sum paid, else we may easily admit the whole to the Executor. Again, the Lease for years, is not so intire a thing; I mean the Land let, but that thereof partition may be made; yea inforced by Action betweene joint-tenants, and Tenants in Common. But here will be objected, the Case of redemption by the daughter

daughter and heir; who though she have a brother born after, so as now she is no longer heire, yet she shall, as the book saith, retaine the Land redeemed from the Heire, as a *Perquisite* or Purchase. As for this (which I will not oppose) the Law so frameth to the favour of the daughter, because of great mischief to her, if being stripped of the rest of the Inheritance by the birth of a brother, she should also lose that which her mony had redeemed, without having any remedy to have her money again, or any recompence for it; but in the other Case, there is no such mischief, for that the Executor may pay himselfe, as hath been shewed.

Now on the other side, if the Case shall be understood, that the redemption was by payment after the day, then will I easily admit that the property or interest, is in the Executor to his own use; or that the Condition, now having no power to reduce it back, or to operate any thing, it is rather a re-emption than a redemption, since it was at the Will of the Mortgagee, to dispose it at his pleasure; and any stranger, as well as the Executor might thus have redee-

med, *viz.* repurchaſed it, therefore onely Equity, and not Law in that Caſe can make any part of the value Aſſets in his hands: And ſo alſo I think, if wee ſhould admit in the other Caſe of payment, at the day that the property of the Chattel is to the Executor as his own, and not his Teſtators goods, no part of ſurpluſage of value, can in Law be Aſſets, howſoever in Equity.

Laſtly, if the Executor redeeme by payment at the day with the Teſtators own money or goods, none will doubt, but that the thing redeemed is in him as Executor, and the mony by him paid for redemption is well Adminiſtred, the goods redeemed being of better value. But this way it makes no difference, whether the whole value of the goods redeemed, ſhall be held Aſſets; and the money paid for redemption ſtand drowned therein, or that that ſumme be ſtill adjudged in the hands of the Executor, as Aſſets, and onely the ſurpluſage of the thing redeemed over and above the ſum paid for redemption.

Things accrued by Covenant or Assumption.

IF *A* Covenants with *B* to make him a Leaſe of ſuch or ſuch land, by ſuch a day; and *B* dieth before the day, and before any Leaſe made; now muſt *A* make the Leaſe to the Executor of *B*, and the Leaſe ſo made to him, ſhal be in him as Executor, and conſequently as Aſſets. This is proved by the judgement, in the Caſe between *Chapman* and *Dalton* in the late Queens time. Yet I confeſſe, that it is not expreſſed in the reſolution of this Caſe, that this Leaſe ſhould be Aſſets, but that the Executors ſhould have the Terme as Executors, which implieth as much in my underſtanding, and the declaration whereupon the Defendant demurreth, ſets forth the breach of that Covenant to be in *retardatione executionis teſtamenti*, ſo as the damages thereupon recovered, *viz.* 330 l. were Aſſets, and conſequently alſo, ſhould the terme have been in lieu and recompence whereof theſe damages were given. The like Law, if *A* aſſume upon good conſideration to deliver in to *B* by ſuch a day, 20 quarters of Malt, or ſo many loades of Plow. Com.

Coals or Wood, or any other Wares or Marchandiſe, and this is not performed in the life of *B.* but after to his Executor; it ſhall be to him as Executor, and ſhall be Aſſets in his hands, as wel as the mony recovered in damages for not performing ſhould have been.

Of things accrued by remainder or increaſe.

IF a Leaſe be made to one for life, the remainder to his Executors for years, and he dieth, this will be Aſſets in the hands of his Executors, though it were never in the Teſtator, as was in the latter end of the late Queens time, reſolved by three Juſtices, the Lord *Anderſon* only being of a contrary opinion; and there it was ſaid that *Cranmers* Caſe, wherein the contrary in effect was reſolved, was of little authority, for that there were firſt two Judges againſt two, till after *Mounſon* changed his opinion, upon a conceite, that there the eſtate was by way of uſe, which could make no difference. Like Law where a Leaſe for years is by Will bequeathed to *A* for life, and after to *B*, who dieth before *A*, al-

although *B* never had his terme in him, ſo as that he could grant or diſpoſe it, yet ſhall it reſt in his Executor as his goods, and be Aſſets. As for a remainder for years, ſo in the Teſtator, that he might grant or diſpoſe it at his pleaſure, no doubt can be thereof, though the ſame fell not in poſſeſſion to the Teſtator in his life time, yet no ſcruple nor doubt can be, but that this is Aſſets to the Executor, even whilſt it continues a remainder, and before it falleth into poſſeſſion, becauſe it is preſently valuable and vendible. Nor much of other nature to theſe, are the Caſes, where the Executor Merchandizing with the goods of his Teſtator, maketh gaine thereof. So if the Sheep, or other Cattel of the Teſtator doe breed, *viz.* beare Lambes, Calves, Colts, &c. after the Teſtators death, even theſe which were never in the Teſtator, ſhall yet be Aſſets, and ſo the Wool growing upon the ſheepe after the Teſtators death. But there is one Caſe worth the conſideration and worthy of ſome doubt, as I thinke, and that is this; One leaveth to the Executor a leaſe for years of Land, worth twenty pound by the year, and the Executor

11 H. 6. 35 per Babington.

keeping this in his owne hands, one year after the Teſtators death, doth make thereof thirty pound in clear gain above all charges; now whether, as to a Creditor, this whole thirty pound ſhall be Aſſets, or only twenty pound; and the Caſe ſimply thus put, ſhall be underſtood of an occupying and manuring without any ſtock of the Teſtators; and then if the Executor did ſtock it with his owne Sheep, or other Cattel, as hee muſt have borne the loſſe by rot or death, ſo is it reaſon, that if the manurants prove gainfull, he reap the fruits thereof in recompence of his adventure, and of his induſtry, skill, and good husbandry. But if the Teſtators ſtock of ſheep and Cattell were (as of neceſſity, or for the better advantage of the Teſtators eſtate) continued upon the leaſe Land, then is it reaſon, that the gain or loſs whatſoever of them God ſendeth, do redound to the Teſtators eſtate. Like Law (as I think) if an Executor, finding that he cannot inſtantly after the Teſtators death, let the leaſe Land neer the value, ſhall therefore buy ſeed-Corn, and hire the plowing &c. But it may be ſaid, that the leaſe hath one entire valuation at the firſt, upon the

appraiſe-

appraiſement. To this I anſwer, firſt, that the value upon the appraiſement is not binding, nor much reſpected at the Common Law; if it be too high, it ſhall not prejudice the Executor; if too low, ſhall not advantage him; but the very value found by Jury, when it comes in queſtion, whether the Executor have fully adminiſtred, or have Aſſets or not, is that which is binding. Next I ſay, that if a long Leaſe come to Executors, of Land worth an hundred pound by year, and no ſale is made thereof by the ſpace of a yeare or more, now the term continuing of the like value, as at firſt, it is no reaſon but this hundred pound raiſed the firſt year, ſhould goe towards the payment of debts and Legacies, rather then any of them ſhould be unpaid. This thing, I mean the knowledg of them are uſefull two wayes, *viz.* Firſt, to give light to Executors, to diſcern what unto them of right pertaines: Next, to ſhew unto Creditors and Legatees, what, and how far things ſhal be Aſſets, that is to ſay, goods to enable, charge, and bind Executors to pay debts and Legacies. For whatſoever any of theſe wayes cometh to the Executors from their Teſtator, or

it recovered by any of these Actions, shal be in their hands Assets, the cost and charges of recovering deducted.

CHAP. VII.

What manner of Interest an Executor hath in his Testators Goods and Chattels, and how different from the common Interest which they or others have in their own proper goods.

THe Interest which an Executor hath (as Executor) in the goods of his Testator, is much different from the absolute, proper and ordinary Interest which every one hath in his own proper goods, as may well appear in and by these points: 1. Although a stranger take away these goods, the Action of Trespasse for the Executor, is of generall form, *Quare bona sua cepit*, calling them his goods; whereas a man outlawed in Debt, &c. or convict or attainted of Felony or Treason, forfeiteth all his own goods; yet these which he hath as Executor, shall not be forfeited. If a Villein be made Executor, his Lord cannot

24 E. 3. f. 35

32 H. 6. 34

not take these goods, though hee may take all the Villeins own goods: and for taking such goods, or for a debt due to the Testator, a Villein may sue his Lord. Nay, if the Executor grant all his goods, some good opinion hath been, that these which hee hath as Executor, should not passe; yea the Lord *Dyer* so held in the late Queens time, with this difference, *viz.* Where the Grantor is named Executor in the Grant, there the goods which he hath as Executor should passe; but otherwise if he be not named Executor in the Grant. And that this opinion is probable, will further appear by that which followeth.

Lit. tit. Villenage 41.42 10 E. 4. *f.* 1. Yet 39. H. 6. *f.* 15. A release of all actions by an Executor extincts actions as Executor. But *Frowick* is against it in 20. Hen. 7. Kel. 64.

Secondly, the Executor cannot by Wil give or bequeath the goods hee hath as Executor; and if he die intestate, and Administration of all his goods is committed to *J. D.* yet hath he nothing to do with the goods which the Intestate had as Executor to his Testator: Thus all his goods reacheth not to his goods as Executor.

Thirdly, whereas a mans goods stand liable to the payment of his debts, both in his life-time & after; the goods which a man hath as Executor, are not to be taken

See these so resolved in Pl. Com. 5. 25 *Inter Brantby & Grantha* P. 20. *Eliz.*

taken in execution for his own debts either upon a Recognizance, Statute, or Judgment had againſt him. And if ſuch a one die indebted, leaving to his Executor much goods, which he had as Executor, ; theſe are not Aſſets in his hands, lyable to the payment of his debts, but onely for the payment of the firſt Teſtators Debts or Legacies. Therefore a *Quo minus* brought by an executor, ſhewing that he was not able to pay the Kings debt, becauſe the Defendant detained from him an hundred pound, which he owed him as Executor to *J. S.* was overthrowne; for that it could not be intended, ſaith the Book, that the Kings debt could be ſatisfied with that which the Plaintiffe ſhould recover and receive as Executor. Whereas a woman being poſſeſſed of any chattels perſonal, *viz.* moveable goods, all be deveſted out of her into her Husband by her marriage, ſo as if he die, and ſhe overlive, they be not hers again, but her Husbands Executors or Adminiſtrators; and if ſhe die, all be the Husbands, without being Executor to his Wife. It is not ſo of the goods which ſhe hath as Executor, theſe ſtill remain in and to her, if her Husband die: and

if

if she her self die, for that she hath them as it were in anothers right, *viz.* as she represents the person of her Testator, her Husband shall not have them, if he be not his Wives Executor, and so Executor to her Testator.

Lastly, whereas the Writ of Trespasse seemes to make no difference betweene ones own goods, and those he hath as Executor, that being a possessory Action or Suit grounded upon the possession; yet come to an Action of Debt, which more tastes and participates of the right, and there are they differenced: for where for my own debt, when I sue, the Writ saith, *Debet & detinet*, viz. that the Defendant ows me, and detains from me that summe. Yet when I sue as Executor, the Writ saith not *debet*, he doth owe me, but *detinet* onely, he detaines from me, as admitting that he is not Debtor to me, though he should pay me; and so where I am sued as Executor, the Writ makes me not a Debtor, but a detainar; Otherwise, where in my owne right, I owe and am sued for a debt; Accordingly, where Judgment in an Action of debt is given against one as Executor, it is not generally that the Plaintiffe shall

This may be in his name onely out of whose possession the goods were taken.

Co. l. 5. f. 31.

ſhall recover againſt him; but he ſhall retover of the goods of the Teſtator; and therefore upon this judgment no *Capias* lyeth againſt him, to inforce him to pay by arreſt of his body, becauſe he is not properly Debtor: but if after it be returned, that he hath waſted the Teſtators Goods, out of which the ſaid debt ſhall be ſatisfied, then he having made himſelf a debtor, a *Capias ad ſatisfaciendum* ſhall be awarded againſt him, and then he ſhall be taken in execution. So alſo in ſome caſes of falſe plea pleaded; for where the Judgment is *de bonis propriis*, the Plaintiffe may have a *Capias ad ſatisfaciendum*, and that Judgment is in divers caſes for the dammages, although not in many for the principal. As for the *Capias* before Judgement, in the mean *Proceſs* againſt an Executor, that is becauſe of his Contumacy in not appearing upon the former Proceſs.

34. H. 6. 45

The reaſon of this different intereſt between an Executor and another, or between the ſame mans having goods as Executor, and others in his own right; as alſo of the different manner of ones being indebted as Executor, and otherwiſe in his own right, is well expreſſed by

by the Lord *Cooke* in *Pinchons* case, *viz.* First, that the goods which one hath as Executor, he hath not in his own right, but in *auter droit*, that is, in the right of another, meaning his Testator. Secondly, that Executors are but the Ministers and Dispensers, or Distributers of their Testators Goods.

Co. lib. 5. 88 b. See this also Plow. com. 5. 208.

Of alteration of property in the Executors hands, so as some goods become his own, which he had as Executor.

TO this head or Chapter, treating of the difference between the interest in Goods as Executor, and others had meerly in ones own right, and to his own use, it is not impertinent to consider how that which one hath at the first as Executor, may be changed in property, and become the Executors own to his own use, as other his goods, which he had not as Executor. Here let us first consider of ready money left by the Testator; for since pieces of money, *viz.* shillings, groates, pieces, and half pieces of gold, cannot be known one from the other, it must needs follow, that these coming to an Executor from the Testator, must in some sort

fort be altered in property, ſo as though the Executor ſhall be ſaid to have ſo much in money or value, yet can it not be diſcerned which money in his houſe was his Teſtators, and which his owne. Conſequently the Sheriffe upon the *fieri facias*, for a Creditor, who hath recovered againſt the Executor a debt owing by the Teſtator, cannot take away mony in execution as the Teſtators, in my opinion; *Quære* if thereupon a *devaſtavit* ſhall be returned, or what ſhall be done?

But what if the Teſtator were indebted to the Executor, or if the Executor not having ready mony of the Teſtators, or otherwiſe, ſhall pay a debt of the Teſtators with his own mony, what ſhall we ſay of the Converſion or alteration of ſome of the goods from being his as Executor, to be his meerly in his owne right? Hereof I have ſhewed elſwhere my conceiving; which is briefly thus; That except either he have in his hands money of the Teſtators, (for of that it is eaſie to make a proportionable change) or unleſſe the ſumme to him owing from his Teſtator, or by him paid for his Teſtator, amount to the full value of all the Teſtators goods in his hands, or do exceed

1 El. Dy. 185 This divers Bookes affirm, ſect. 20 H. 7. 4 & Kelw. Rep. 59 & 2. 3. El. Dy. 147. 6 H. 8. Dyer fol. 2. a.

cted the ſame, no alteration can be untill ſome election or declaration by the Executor made, which of the goods, not exceeding the debt unto him, he will have to be his owne; For where the Teſtators goods exceed this debt to him, the property of all cannot be changed, and of what part ſhall the Law adjudge the change, till choice by the Executor? It is good therefore for him to doe as the Mother Guardian in Soccage, who is to endow her ſelfe, calling her neighbours, and expreſſing to them which part of the Land ſhee will have for her dower. So let the Executor doe, but let him take heed that his election or declaration exceed not his debt, leſt it be void. And that ſuch particular election is to be made, ſeemes to me proved by the Caſe of 21 *E.* 4. *fol.* 21. where the payment of money, and detaining or taking of a Horſe of the Teſtators, is mentioned; But *Choke* there ſayes, this cannot be done without the Ordinaries aſſent. And the Reporter thinks, though the Ordinary doe aſſent, yet the property ſhall not be turned into the Executor as his owne.

Plow. 544 So of a Legacy in money given to the Exec.

See 2. 3 Bl. Dyer 187

2. Another alteration is of the profi
of a Leaſe come to the Executors fro
the Teſtator; For ſince no more ther
of ſhall ſtand in the Executor as Aſſe
then ſo much only as exceeds the yearl
value, according to the reſolution in *Ha-
graves* Caſe, it muſt needs follow, tha
the reſidue of the profits muſt bee the
Executors, he paying the rent out of hi
own purſe, as that Caſe reſolves in con-
Co. l. f. 31 b. ſequence, *viz.* that he ſhall be ſued for
it in the *debet*, and in the *detinet* only
as for the rent due before the death o
the Teſtator. Thus though hee hav
the Leaſe as Executor; yet part of the
profits are meerly his owne, not as Exe-
cutor.

And looking back upon this Caſe, w
may diſcern a neceſſity ſometimes of the
Executors paying with his owne money
for his Teſtators debt, as where the
Teſtator being to pay a rent at *Mi-
chaelmas*, or our Lady day, dies a da
or two before; or to put it more clearly,
a day or two after the Feaſt, not lea-
ving any goods to pay the rent, othe
then the future profits of the Leaſe. Here
unleſſe the Executor will forfeit the
Leaſe, he muſt lay out of his own mony.

Now

Now if in this and other like Cases hee could not do this untill he had under seal, or by act in the Court Spiritual, an assent of the Ordinary, it would be an extraordinary trouble to Executors.

I find also *tempore Hen. 7.* another mean of altering property (to wit) where a *fieri facias* comes to the Sheriffe to sell, or leavy a debt of the Testators goods; now saith the Booke, may the Executor buy these goods of the Sheriffe as well as another, and if he doe, the property which hee had as Executor shall be turned into a property *in jure proprio*. 10 H. 7. 5. a.

If an Executor amongst his Testators goods find and take some, not his, and after these being claimed by the owner, who left them in the Custody of the Testator, the Executor not crediting the claime, still keeps them, and the owner thereupon recovers damages in an action of trespasse or of *Trover* and *Conversion*; now (and so in all other like Cases) are these goods become the Trespassors in property, because he hath paid for them; therefore it is not strange, if in like manner an Executor paying out of his owne purse, for or in lieu of the Testators 10 H. 7. Kelw. Ca. 58

goods, have ſo much of them (where no certainty) changed in property and become his own. This is but put as an inſtance underſtood with the exceptions and cautions precedent.

CHAP. VIII.

Of ſome caſes and queſtions between the Executor and the Heire.

a1 H6. 30 If other goods taken amongthem, he is excuſed.

a1 H7. 25 *Vide l. Inſt.* 840 It is ſo pleaded.

THe Executor may in convenient time after the Teſtators death enter into the houſe deſcended to the Heire, for the removing and taking away of the goods, ſo as the door be open; or at leaſt the key be in the door: and this I underſtand of the door of each room; for although the door of entrance into Hal and Parlor be open, the Executor cannot by that juſtifie the breaking open of the door of any Chamber to take goods there, but only may take thoſe in the rooms which be open; and this is proved, as to me it ſeems, by the Caſe of the cheſt with Evidences, which, ſaith the Booke, the Executor may

may take and put out the Deeds, delivering them to the Heir, *viz.* the cheſt being unlocked, as I underſtand it. Now a Chamber or other room within a houſe locked is an incloſure of better reſpect then a cheſt. But if the goods be not removed within convenient time, the heir may diſtrain them as *damage feaſant*.

43 E 3.24 Bro. 145 Makes a quæ. if it be locked.

Plow. Com. 280

Where the Teſtator recovered land and damages, or a deed and damages, he dying before Execution, the Heir ſhall have excution for the Land or Deed, and the Executor for the damages: but *temp. Edward* the 4. it is ſaid that untill the Heir ſue a *Scire Facias* the Executor cannot ſue execution for the damages.

43 Ed. 3.2
10 Ed. 4, 5, 6 Of the deed Execution firſt.

If a Creditor be made Executor by his Debtor, and pay himſelf part out of the Goods, he cannot ſue the Heire for the reſt, becauſe the debt cannot be apportioned; but otherwiſe, he may, ſaith the Booke: yet *Qua.* if he do take upon him the Executorſhip, and have goods ſufficient to pay all.

13 H 4

If a debt be recovered againſt one who dieth before execution ſued, leaving goods ſufficient to ſatisfie: now ſhall not the Land deſcended to the Heire be charged

7 H 4. f. 31 See Bro. Ex. 124.

ged therewith, nor by like reason any land conveyed after Judgement.

Co. l. 1. f. 90 91. To like purpose see more, Lind. 177. b. 2 El. Dy. 281. Plow. com. 391. 21 H. 7. 4

See a good difference where land is conveyed, upon condition of payment to the Vendor his heires or Assignes, and he dieth before the time, and where it is to be paid to the Vendee his Heires or Assignes, and he dieth; in the first case, payment shall be to the Executors, but not in the other.

What things pertaine to the Heir, and what to the Executor is before shewed. As for *Frowickes* opinion, that where goods be mortgaged upon condition, that if the Heire or Executor pay, &c. here if the Heire make payment, hee should have the Goods. I see not how that can be.

A Directory for the following Chapter.

A. *All (as but one) represent the Testators person, and must joyne and be joyned in suite, & e contra.*

B. *Where one alone must answer suite, and how.*

C. *When they differ in Plea, the best shall*

be taken, but one may confesse alone.

D. *One as well as all, hath, may give assent or release the whole.*

E. *One cannot give nor release to another, nor divide.*

F. *The possession of one is the possession of all, to what purpose.*

G. *If the surviver die Intestate, the Testater is Intestate, though the other Executor left an Executor.*

H. *Executor Included in the person of the Testator, and represents it. Is his Assignee; all one,* & è contra.

I. *What change by death of the Testator, touching proceeding in suit.*

K. *Procted to or in Execution; where without* Scire Facias,

M. *Whether the Executor stand in his own quality or his Testators.*

N. *Where one alone may sue.*

O. *In suite for them, such as will not joyn, shall be severed, and the other may sue and prosecute alone*: consequents inde.

P. *Death of one Executor, Plaintiffe or Defendant; where abates Writ.*

CHAP. IX.

How Executors ſtand between themſelves, and in repreſentation of, or relation to the Teſtator; as his Aſſignee or Deputy, or as the ſame perſon with him; and where, and to what purpoſe, as other perſons.

Are as one perſon; therefore cannot plead ſeverall pleas in abatement. 37 H 6 17 9 H 6 l. 44 28 E 3. 9 Bro. Ex. 13 Bro. Ex. 20, 21 Therefore one Executor ſued, if he pleads that there is another Executor not ſued, muſt plead that he did Adminiſter. 9 H 6. 44 Bro. 13. 33. H 6. 38 Bro. 20 32 E 3 quid juris clam. 5

First, all of them do repreſent the perſon of the Teſtator, and therefore muſt they all joyne in ſuite againſt others, and in ſuite by others they muſt be all made defendants, or at leaſt ſo many of them as doe Adminiſter: for though the Executors themſelves muſt take notice by the Will, how many Executors bee, and muſt frame their ſuite accordingly; Creditors and ſtrangers need not take notice of any more then do Adminiſter, and Execute the Office of Executors. For this reaſon, as I take it, in the time of King *Edward* the third, where two Executors were of a terme, and the reverſion was granted by Fine, mentioning but one termer, and thereupon a *Quid juris clamat*

clamat accordingly brought against that one executor; this was held good enough, though the other executor was not named in the Suit; belike, because that one (who indeed was the Testators Wife) did only occupy the land, and take the profits thereof; for else, since all the Executors do represent the Testators person, all must have beene named. Therefore did the Judges resolve in the time of *Hen.* 4. that where a Lessee for years made two Executors, and one of them was distrained by the Lord for Rent, who avowed upon the Lessor, that Executor should have aid of his fellow Executor, to the end that both might have aide of the Lessor, which one alone could not. And upon this reason, *viz.* that the Executors represent the person of their Testator, as one person (for so speakes the Parliament) It was enacted in the time of *Edward* the 3, that the Executors, though never so many, shal have but one essoyn, neither before appearance nor after, because their Testator whose person they represent, could have had no more.

13 H. 4. Aid. 186

9 Ed. 3. c. 3

It is further also enacted by the said Statute, that where two or three Executors or more be, they being sued in an action

action of debt, though all do not appear, yet such one of them or more as doe, doth appear at the *Grand distresse*, shall answer alone without his companions. And this Statute hath beene taken by equity in three respects.

First, touching the persons: that it shall extend, not to executors only, but also to Executors of Executors, yea, to Administrators also, though the Statute speake only of Executors.

Secondly, touching the Actions; whereas the Statute speakes only of the Action of debt, it is taken by equity to extend to other Actions, as the Writ *de rationabili parte bonorum*; and *detinue*, yet perhaps this latter Action will be said not to be maintainable against Executors, for their Testators act, but for their own onely; But we yet are not come so farre as to determine what is maintainable; but whether before all the Executors do appear, he, or they which have appeared shall be put to answer; and so to bring it to *decision*, whether the Action be maintainable or not. I thinke also that in the action of Covenant, and all other actions against Executors, as Executors, hee which appeareth, must

If not, if he appear at the summons. 1. E. 4. 1. 14 H. 4. f. 11. But the plaintiffe must declare against all. He need not, but he may admit another to appeare and plead after. 7 H. 4. 12 But processe must be continued against all. 7 H. 6. 35 Executors of executors by equity. 30 H. 6. 45 Bro. Exec. 99 28 H. 6. 64 14 H. 4. 23 24. So negatively. 21 H. 6. f. 1 28 H. 6. f. 4 3 H. 6. 35. a 39 E. 3. 5 There it is not meerly as Executors: it is out of the statute. 11 H. 4. 63 As if in *det. & det.*

must answer without his companions, though the greater opinion in the *Quadragesimes* were contrary touching the action of Covenant. But as for the *sub pœna* against the Executors, which is to make them to answer to a suit in equity; that hath been *temp. E.* 4. taken to be out of the reach and intent of the Statute. So also of the *Latitat* in the Kings Bench, as was held in the same Kings time: except all the Executors, making up the whole representative body of the Testator, be in the custody of the Marshall, one or more of them who are there shall not be inforced to answer; and so was it also lately held in the Kings Bench, where Master Justice *Houghton* gave an excellent reason that this case is out of the said Statute, *viz.* for that this Writ doth not mention any debt, or name the Defendants Executors.

B
Cont. 47. E 3.22. So 7 E 4. 20, 21 3 H 4. 20 In *sci. fac.* upon a pardon by Defendant outlawed at their suit. 47 E 3.22 Only Fenold in the affirmative. 8 E 4. 5 9 E 4. 12, 13

B
20 vel 21 Jac. regis.

Thirdly and lastly, that Statute is extended by equity to other Writs or Process; for where the Statute speaks only of the Grand distresse, and the Executors appearing thereupon; It hath been many times ruled, that when he or they appeare upon the Attachment, *Capias*, or *Exigent*, answer must bee, though the

B.
1 E 4. 2
40 E 3. 2

the rest appeare not; for so the word *Distress* is taken for all compulsory means or enforcement of appearance. But where the Statute reacheth not, *viz.* when the Proces is determined against one or more, as by Outlawry, &c. there the rest must answer by the rules of the Common Law; Except it be in the case of Husband and Wife Executor, for there the Wife cannot answer without her Husband, nor doubtlesse can he without her, where she and not he is Executor; but where both be Executors, there he may answer without her, but not she without him. When Executors as Defendants have appeared, if any one of them will confesse the Action, this bindes and concludes the rest; but if one will plead one plea, and the other another, that say some, shall be received which is best for the Testators state; so where they sue, such as wil not prosecute, shall be severed, and the rest without them may proceed; and in like manner where they pray to be received to defend their term, and one of them after makes

B
11. H. 4. 63.
C
Or if but one appeare, 28 H. 6. f. 364. judgement against all. See 9. E 4. 12, 13, 14. Where B who is not Executor is joyntly sued with A and B confesseth 21 H 7. 25 Yet 7. E 4. 7. they may sever in pleas not dilatory.

C
7. H 6. f. 6 per. Cottesmore. If they recover, and one of them prayes a cap. ad. sat. and the other a Fieri fac. the first, as best, shall be granted 3. H 4. 10 Bro. 44. So where the Defendant Outlawed at the suit of two Executors, and upon the Sec. fac. after his pardon but one appeares, 21. H. 7. 25. 9. E. 4. 12. 14.
D

default;

default; it shall not be the default of all, but the rest; or he, if it be but one who appeares, shall be received to uphold the defence of the terme.

Thirdly, so where they plead a release to the Testator or themselves, one after making default; this shall not be, nor make a total default in the Executors, to induce a judgement or condemnation against them. Yet in truth each Executor hath the whole of the Testators goods and Chattels, be they Real, or Personal, and each may sel or give the whole. One of them cannot give nor release to the other his Interest, and if he doe, it is void, and he who releaseth shall still have as much interest, as he to whom he released, because each had the whole before; upon this reason long since, where one of the two Executors released but his part of a debt, it was held that the whole was discharged: and so if one Executor grant his part of the Testators goods, all passeth, and nothing is left to the other, for that each hath the whole, and there be no parts or moyetyes between Executors. Therefore, also though a Lease for a thousand yeares, of a thousand Acres of Land come to two Exe-

21 E. 3. 13
27 H. 8. 21
22

D E

C

If an horse come to foure Executors, each hath an horse, and yet all foure have but one.

E Executors or more, no partition or division can be made between them, because it is not between them, as between joynt Lessees of Land, where each hath but a moyety in Interest, though possession of or through the whole. Amidst

D Executors each hath the whole, & therefore if he grant his part he grants the whole. But one Executor may demise or grant the moyety of the Land for the whole term, and so may the other doe; and this way they may settle in friends or others trusted for them, a moyety for each; either in several or undivided, but one of them cannot make a lease to the other of any part, for he had the whole, nor can one sue the other as Executor: yet if the Testator devise to one

6. H. 7. 5. of his Executors, all his goods, after such debts and Legacies satisfied, there after those satisfied; the Executor may take the Goods, and maintaine an Action of Trespasse against the other Executor, if he take them from him, and consequently an Action of *detinue*, for keeping or detaining them: but this is as Legatee, his own assent perfecting the Legacy.

The possession of one Executor is the pos-

possession of all the rest; so, as if one appearing to a Sute, and the other making default, in whose hands all the goods be which are not administred, if, I say, here he that appeares, pleades that he hath nothing in his hands, this shall be found against him; for whatsoever any of the Co-executors hath, he also hath, and is in his possession, and so shall the Creditor recover, and have judgement to be satisfyed out of the Testators goods, as in his hands. And therefore if goods be taken from one, all may maintaine an Action of Trespasse thereupon; for the possession of one, is the possession of all. But the possession of one shall not be so the possession of all, as to charge the others owne goods, whereof more elsewhere.

14. H. 4. 12. Bro. 12.

F

All must sue, 19. H. 6. 65. cont. 24. E. 3. 40. and 42. E. 3. 26. It may be in his name onely from whom taken, nor need he be named Executor. Bro. Exe. 31. 39. H. 6. 45.

F

G

Where two Executors be made, the one making a Will and Executors, and dying; if the other dye after Intestate; now shall not the Executor of him who first dyed, be Executor to the first Testator, but he is dead Intestate, because the survivng Executor is so dead; and in him the Executorship was wholly and soly setled by the death of his fellow before him: So Administration *de bonis non admin.* shal be committed.

32. H. 8. Bro. Exe. 149. 39. H. 6. 45.

The

The Executors or Executor, if but one so represents the person of his Testator, that he is in Law his Assignee by the very making of him Executor; so as if one covenant to make a Lease to *I S* and his Assignes by such a time, and *I S* dieth before that time, and before the Lease made, now must the Lease be made to his Executors as his Assignee, representing his person; so also in a condition to pay to the Feoffor or his Assignee, yet a Lease to *A* and his Assignes during the life of *B*, shall not go to the Executors of *A*. So where in a general pardon by Parliament, there is an exception of persons outlawed after judgement, the person so out-lawed shall satisfie the Creditor, who hath out-lawed him. If the Out-law die before this done, his Executor, as representing his person, may make satisfaction, and so make the benefit of the pardon to extend to his Testator, for saving his goods, as if himself had satisfied his Creditor, though he left him unsatisfied, when he left the world, *& diem obiit extremum*. Yet where *A* sold Land to *B* upon *Proviso*, that if he payed to *B* his Heirs or Assignes &c. *B* died, *A* payed at the day to his Executor,

Co. lib. 5 f 17 I H Chapman & Daltons case. Plow.

Sir Edward Phittons case. Co. lib. 6. f. 80

A So where the stat. of W. 1. gives time for proofe to him whose goods were wrested, his Executors may do it, if he die before the time. Co. l. 5. 107 b. Co. lib. 6 f 80

for, and it was doubted that it was not good, for the word Assignee could not reach to him being no Assignee of the Land; and where the Executor brought an Action of account upon a receipt by the hands of the Testator, the Defendant could not be admitted to wage his Law; for that this was held a receipt *per antermains*; yet it is clear, that if one by Bond or Covenant tye himself to pay such a summe at such a day, not mentioning his Executor at all; yet is the Executor bound, as included in the name or person of the Testator. And where the Statute 23 of *Hen.* 8. gives the Writ of attaint (in the course there mentioned) against the party that had judgement, it lieth against his Executors if he be dead; but thereof another reason is given: where a man was bound that he would not sue upon such a Bond, and hee died, and his Executor sued; this was held to be no forfeiture of the Bond. So where one was bound to pay ten pound within a month after request made to him, and he died before request; it sufficed not to make it to the Executor, as *Manwood* said. It was likewise held that the warrant of Attorney put in for the

Also Executors may have restitution of stolen goods, and a writ of Error; yet the Statute speakes but of the party.

H 2 El. Dy. 180 Conte. where to pay to A the Feoffer his Heir or Assign.

Co. lib. 5 f. 97 2 Eliz. Dy. 183 3 Eliz. Dy. 201

H 27 H. 8. 16

M 15. & 16 Eliz.

I
34 H. vel circiter Tr. Hertz & Lexcor. Walsh. in ba. reg.

I
36 H. 8 Bro. Stat. Merchant 43

K
2 R. 3. 8

H I
15 H. 7. 14

F
15 E 3 Respond. 1. con. upon a Stat. Merchant

K
Conte Na. br. 167 upon a Recog.

I

H
30 El. tot. 31 in ba. reg.

Plaintiffe in debt, it [illegible] not for [illegible] Executor to bring a *Scire facias* upon [illegible] judgement. And if Executors sue execution upon a Statute in the name of [illegible] Conusee, as if he were alive, this is void, and they may sue out new extent, and this they may do without any *Scire facias*, as well as the Conusee might, if he had been alive. But by *Hussey* Justice, if the Conusor in a Statute staple be returned dead by the Sheriff upon the extent; a *Scire facias* must be sued out before extent proceed; and upon a judgment had, if the recoverer die before execution, his Executor cannot as himselfe might, sue out execution without a *Scire Facias*, as is there said. Yet if after a *Capias ad sat.* awarded, the Plaintiff die before it be executed, the Sheriff may proceed to the taking of the party, and is not subject to any action of false imprisonment; nay, if hee suffer him to escape he is chargeable, as [illegible] *Elizabeth*. it was resolved upon the [illegible] tion of *Anderson*; but withall it was held that relief might be by *Audita querela*. Like resolution was in the Kings Bench after some doubt by *Wray*, and the other Judges, where the Defendant die

after

[illegible] fore it was executed, that the Sheriffe might proceed upon the goods in the hands of the Executors.

But if the Defendant in an Action of debt upon a bond plead a tender at the time and place of payment, and tenders the mony in Court, where it rests, and then he dies, now shall not the plaintiffe have this mony, because the property thereof is changed, and become the Executors, as was held in the Common Pleas; but he is put to a new suite against the Executor. Yet where judgment is once given in a Writ of Partition, for a termer, or in a Writ of Account, if the Plaintiffe die before the second judgment needful in both cases, the Executor is not put to a new suit; but may proceed by *Scire facias* upon the former judgment, as the Lord *Anderson* held upon the motion of *Fenner* Serjeant. Though before we found the Executor not in points penall, all one with the Testator, yet in point beneficiall, the Testator includes him in some cases; as where an Abbot granted to his Lessee to take Estovers in another ground, it was held, that his Executor though

32 El. vel circiter. I Pas. 28 2 H

 not

not named, should enjoy this, during the terme, as well as himself should have done. And whereas the Statute 23. of *Henry* the 8. gives costs to a Defendant against a Plaintiffe, sueing for a wrong, or breach of promise, or the like, done to the Plaintiffe against whom it passeth by verdict or nonsuit; it hath beene resolved that an Executor suing upon such wrong, or breach of contract to his Testator made, should not pay costs, because he is another person then the Testator; and so is it usuall in experience. But if in such suit, the Attorney of the Executor misbehave himself towards him, and for that the Executor sueth him, here if it passe against him in manner as aforesaid, he shall pay costs, because this was a suit for a wrong done to himself.

Trin. 36 El. in ba. reg. *H M*

Pa. 41 Eliz in com. ba.

If *A* recover a debt as Executor of *I S.* and makes *B* his Executor, and dies before execution sued, *B* is not put to new suit, but may have execution upon that judgement: But if *A* or *B* die Intestate, now could none as Administrator to either of them, nor as Administrator of *I S.* have execution of the judgment; for the former hath no inter-

7

H

28 *H* 8

as any thing pertaining to *I S*, & the latter commeth to title above the judgment, *viz.*, as immediate Administrator to *I S*, who is now dead intestate: and derives no title from the Executor who recovered.

If a Conusee have a Certificate into the Chancery, upon a Statute, and then dies before extent taken out, his Executor is put to a new Certificate, and for obtaining of it, must make Affidavit, that no extent hath yet beene taken out. 1 El. Dy. 180 I

If an Alien joyne with his Wife, who is Executor in a suit for debt, and it commeth to Issue, he shall not have tryall *per medietatem alienig.* or *Linguæ*, as should be if he otherwise were party to a triall, as was held in the case of Doctor *Julio*. Yet if a Noble man sue as Executor to another, not noble, hee shall for his non-suite be amerced five pound, as if he sued in his owne right, as was conceived 21 *E.* 4. 77. By the same rule & reason doubtlesse a Noble man sued as Executor, shall not be arrested, nor shall any *Capias* be awarded against him for not appearing. And if any trial shal be of any issue, there shall be two Knights M

of the Jury, as in other cases where a Peere is party. Likewise where the Wife is to have her convenient apparel, whereof the Executor must not bereave her; If she be a Noble woman, it shall be answerable to her degree.

A 38 E. 3. f. 9 N

If one Executor only sell Goods of the Testator, he alone may maintaine an Action of debt for the money. So if goods be taken out of the possession of one Executor, he alone may maintaine an Action, and that without naming himselfe Executor.

Some touch hath been before of Summons, and severance, whereabout be this added. If one Executor will not, or cannot joyne in suit with the other, so as he is summoned and severed, now by his death, after the suite is not abated. 16 *Ed.* 2. *Fitzh.* 111. yet if hee live till judgment, he may sue execution, say other Books, 13 *Ed.* 3 *Fitzh. Exet.* 9. 11. *R.* 2. *Privilege* 2. yet *Que.* of that, for he cannot acknowledge satisfaction, as hath been since resolved, *Mich.* 14. & 15. *Eliz. Dy.* 319. And the reason thereof being, because he is no party to the judgment, by the same reason can hee not sue execution upon it; for how can hee

P O 3 H. 7 I & 5 E. 3 Fitz. bro. 80 2. Conte. 38 E 3. 13 & 20 E. 3 tit. accompt 78.

to have execution for whom there is no judgement given? now the recovery is only in the name of the other Executors; yea, by the said last Booke, it seemes that after judgement had, he cannot release the debt, because it is now altered in nature, and turned in *rem judicatam*, though at any time before judgement he might have released it, as both that last booke saith, and the two precedent *temp. Ed.* 3. *Rich.* 2. yea in an Action of account, after judgement had, that the defendant shall account, the release of him severed, is a good discharge to the Defendant, as was resolved 48 *Ed.* 3. 14, 15. but this is not a plenary judgement, for nothing is recovered thereby, but another judgement is to be had after the account, which may be against the Plaintiffe, so as this release came before any debt or duty adjudged. What if the Defendant be had in execution at the suite of the Executor, who prosecutes it, and escapeth; whether may the severed Executor discharge the Sheriffe or Jaylor by a Release? I think hee may not.

By that above it is plain, that if any one of the Executors Plaintiffs die, the

Writ is abated, only where he so dying was before severed; opinions have beene different, as above appears. So also is it, if one of the Defendants Executors die. Yea, if the Plaintiffe Creditor sue *A B* and *C* as Executors, where only *A* and *B* are Executors, thereby the death of *C* the Writ abates, or falls to the ground: yet *A* and *B* (as I think) might have pleaded in abatement, that they only were Executors, traversing that *C* was not Executor: but the Booke doth not so resolve. See 46 *Eliz. of.* 9, 10.

As *A* and *B* above might admit that Writ against them and *C*. So if the Writ or Suite had beene against *A* only, and he so admit it, not pleading in abatement, the recovery against him alone is good. 39 *Ed.* 4. 12.

One that is outlawed or attainted in his own person, may yet sue as Executor, because this suit is in anothers right, viz. the Testators: But hee that is excommunicate cannot proceed in suite as Executor, because none can converse with him without being excommunicate, as a book sayes. Yet doth not this excommunication pleaded, abate or overthrow

the

the suite, but make that the Defendant may stay from answering his suit untill the Plaintiffe be absolved and discharged from his excommunication.

3 H.6.40 Littl.44 Co.l.81.69 11 R.2 Excom.13

CHAP. X.

Of the Possession of Executors, or their actuall having.

1. *What shall be said so to come to their hands, as to charge them.*
2. *What shall be such a getting or going from them as to excuse them.*

WE have before considered what things shall come to Executors, and being come, shal be assets in their hands: Now for that it is said in *Reedes* Case that an Executor shall not be charged with, or in respect of any other goods than those which come to his hands after his taking upon him the charge of the Executorship. Let us now examine what shall be said, and accounted such a full and compleat coming to the hands of Executors, as shall make them within the reach

Co. lib. 5

reach and charge of Creditors, and Legatees, *viz.* For the payment of debts and Legacies. As touching debts due to the Testator, it hath before been shewed, that until Judgement and execution had, they be not Assets in the Executors hands. Now then, as touching other goods or chattels possessory, which are of two kindes, *viz.* real, and personal, Let us put the case thus. The Testator at the time of his death hath a flock of Sheepe in *Cumberland*, Corne in the Barnes in *Cornewall*, Bullockes in *Wales*, fat Oxen in *Rock-shire*; Money, Houshold-stuffe, and Plate in *London*, a Lease for yeares in *Norfolke*, and his Executor dwelt at *Coventry*, *viz.* farre from all these places, what kinde of possession shall the Law judge this Executor to have in every of these, instantly upon the Testators death, and before he come where any of the things be, either to see or seize upon them? In all the particulars above mentioned, the Law is all one, except the Case of the Lease for yeares, which if it be of Land (as is most usual) then because it is a setled and immoveable thing, the Law doth not reach to it the foot of the Executor, to

put

put him in actual possession, for (*Possessio est quasi pedis positio*) until himselfe, or some for him do actually enter thereupon. Nor indeed need the Law help or supply the want of actual possession in this Case, as in the Case of moveables: since Land cannot be carried away as goods may, and therefore is not subject to purloyning or imbesilment as moveables are. But if the Lease for yeares, were of Tythes, the Executor, though in never so remote a place from them, shall be instantly upon the setting out thereof in actual possession of them, so as he may maintaine an Action of Trespass against any stranger which shall take the Tythes set out, though he, nor any for him did ever before possess any of the said Tithes, or came neare unto them. But if the case were of a Lease for yeares of a Rectory, consisting not only of Tithes, but also of Glebe Lands, into which entry may be made, as also Livery of seisin in it, then it may perhaps be some question, whether such an actual possession in Tithes, shall be given by the Law to an Executor, neglecting to enter, or not entring into the Glebe Land. And so I leave the consideration of Chattels Real. 45 E 3. 17. 21 H 6. 43

Touch-

the Executor hath such an actual posse-
sion presently upon the Testators death
as that he may maintaine an Action of
Trespasse against any stranger takin
them away or spoyling them, though he
nor any for him ever came neare them
whether yet this shall be such a possession
in the Executors, and such a coming of
these goods to their hands, as to charge
them with payment of debts & Legacies,
yea to make their owne goods liable, in
stead of these, is a point worthy of con-
sideration.

And doubtlesse, this throughly sifted,
will prove a Case mischievous, whether
way soever the Law be taken; for first, it
must be admitted, that without the Ex-
ecutors laying his hands actually and
particularly upon the Goods in the
House or Fields of the Testator, whe-
ther the Executor hath resorted, he
shall be said so in possession, as to stand
lyable unto the Creditors, so far as they
extend in value, though after others pur-
loyne or imbesil them. Now then, if di-
stance of place shall make difference,
where shal be the bound and limit of that
distance? & if the Executor may come af-

ter

On the other side, if it shall be laid upon the Executors to answer for all the goods whereof the Testator dyed possessed, it will be mischievous for them, and deterre them from taking Executorship upon them, since much purloyning may be even of money, Jewels, and Goods, by Servants and others, about the Testator, or where these things be. I thinke therefore, that if without any fraud, collusion, or voluntary conniving on the part of the Executors, they be prevented by others of laying hold on the Testators Goods, so as that they may dispose of them; especially, if it cannot be known by whom they are so purloyned, and imbesiled, or if they be persons fled, or insolvent, that then they shall not stand upon their score, as goods come to their hands, in respect whereof, Creditors or Legatees shall draw so much from them, even out of their owne Goods, as in other cases, where they have no such excuse.

And of this minde I the rather am, because I find the whole Realme in Parliament,

liament, taking notice of such pre-
tion of Executors, coming to the go-
of their Teſtator, by the wrongful
and imbeſilment of others, without
default in themſelves. And in this C
the Parliament hath given ſpecial rem-
dy, viz. that Writs ſhall be directed
Sheriffes, to make open Proclamatio
for the appearance of the parties de-
quent in the Kings Bench, at the day
mited, and in default thereof, they ſh
be attainted there of felony, the Writ b
ing returned executed, viz. Proclamation
made, But note that this Proclam. is t
be made two Market daies within twelve
dayes next after the delivery of the Writ,
and the laſt Proclamation muſt be fifteen
dayes before the day of appearance.
And theſe Proclamations muſt be made
in ſuch Cities, Burrowes or Places (ſaith
the Statute) not expreſſing what is meant
by the word *Such*, and therefore mean-
ing doubtleſſe thoſe in which the act or
offence is committed. So that if the
fact be not committed within the limits
of ſome Citie, Burrow or Market Town,
no remedy is to be had by the Statute;
for that the Proclamation is to be made
upon Market dayes, in the place where,

&c.

&c. Now besides other Places, even some Burrowes, *viz.* Townes, sending Burgesses to the Parliament, have no Markets, and so are no places within the Act. Also two Executors must require this Writ, therefore where there is but one Executor, no relief is given by this Law, for it is penal, making felony, and therefore shall not be extended by equity beyond the Words. Lastly, it extends but to the Executors of Lords and Persons of good degree, and onely to the Trespassing servants of such Persons, not to other strangers purloyning the goods. But now who shall be said to be Persons of good degree, not being Lords, I will not much labour to decide, the rather because I have not heard, nor read, to my remembrance, of any Action brought upon this Statute; but I thinke that good degree must stay either at a Knight, being the lowest dignity, or at a Gentleman, being a degree of Worship, as elsewhere is shewed, and not stoope any lower.

And the said Statute seemes in some sort to imply an opinion this way, which I incline to, in that it expresseth this purloyning to be an impediment of the Execution

cution of the Will, whereas if the Executors shall answer and make good the Creditors and Legatees, out of their own state and goods, for these imbezelled, the execution of the Will is not hindered, but the Executors are damnified in their own private value: yet it may be said on the other side, that some things given in *specie* by the Will, such a piece of Plate, such a Furniture of a Bed or Chamber, such a Jewel may be purloyned, so that the Legatees can never have them, and consequently the Execution of the Will be hindered, though some recompence be made by the Executors: but how these Legatees shall recover recompence in such cases; for that Legacies are not to be recovered by Suite at the Common Law, I must leave to the Professors of the Common or civil Law to inform. But if the Executor be of secret assent to this imbezilment, whereof even the forbearance to sue for the recovery of the things, or the value of them in damages, if known where they or the imbezelers be, is a shrewd evidence or proofe. Then shall the Executor be adjudged an haver of them, and so stand charged as having them, for *Pro possessore habetur qui dolo*

dele desiit possidere. And if in any Case the taker by prevention from the Executor, before his knowledg (perhaps) of the Testators death, or at least, before his possibility of repair to the place where the goods were, to put them in sure Custody; if I say, such actor keepe these goods from falling upon the shoulders of the Executor, they shall surely fall upon himselfe, and make him chargeable at the Creditors suit, as an Executor of his owne wrong.

Of goods lost by, or gotten from Executors.

But put we the case (for thereunto shall be our next step) that goods come fully into executors possession and hands, but be again lost or gotten from them without any default in them, shall they yet stand answerable out of their owne estates for them? Surely hereabout two distinctions must be made, as I take it.

The first whereof I derive from our learning touching escapes of persons taken in Execution and imprisoned, if such be rescued by Alien enemies, the Sheriff or Jaylor shall not answer out of his own Goods for this debt; otherwise, 33 H 6. 1 16 E 4. 2, 3 7 Eliz. Dy. 241.

it be done by Subjects, against wh
remedy is to be had by the course of
stice: and so should I think it to
touching Executors, *viz.* that if a
mies landing (as neer the Sea Coast
easily, and often happen) shall take
way Cattel, or goods from an Exec
tor, hereby he shall be excused; contr
riwise ordinarily, if the ereption or d
reption bee by Subjects knowne a
thereby actionable. Another differen
I shall think may probably bee tak
from the rules of our learning, touchin
Bailement. If *A* deliver goods to *B*
keep as his owne, or generally, *viz.* with-
out any special undertaking by *B* to ke
them safely, and without any money
other valuable consideration, given f
the safe custody; here, if *B* be robb
of them, he shall not make satisfactio
to *A* for them; and so if they be stol
from a Servant or Factor. But if th
be taken away by a known Trespasse
not feloniously; some opinion ha
been, that the Keeper shall make re
compence, because he hath remedy fo
recompence, or satisfaction from th
Trespasser; yet of this latter I shou
doubt, because *A* himself as well as

Vide 29 Ass. p. 28. 8 E 2 Fitz. Detin. 59. 9 E 4. 90. 13 H 7. 4 Co. li. 4 f. 83, 84

may

may have this Action for damages a-gainſt the Treſpaſſer. Now an Execu-tor is of the nature of ſuch one having the cuſtody of another mans goods, and I have ſeene in a Manuſcript entire, the Writ of Treſpaſſe by the Executor, ex-preſſing goods of the Teſtator, in the Cuſtody of the executor to be taken from him; therefore me thinks he ſhould no otherwiſe be charged than *B* to whom goods were, as above is ſaid, delivered to be kept. For the Executor haply ſhall have no benefit nor advantage by the Executorſhip, all the goods not ſuffi-cing perhaps to pay debts and Legacies, which is the ſtate we moſt think of, *viz.* where goods want to pay debts and Le-gacies, for where there wants not, the queſtion needs not be made. Yet a Ser-vant or Factor, who hath wages for his ſervice, is not thereby made liable to ſa-tiſfie for things in his cuſtody ſtolne, be-cauſe he hath not for this particular cu-ſtody, any compenſation; ſo of an execu-tor, if perhaps benefit might accrue to him by the Executorſhip, as haply the diſ-charge of a debt owing by himſelf &c. Other Caſes there be, wherein the Execu-tor will ſtand more clearly diſcharged As

In cuſtodiâ ſua exiſt.

if the Teſtator left a Leaſe for years, ſtat
by extent, wardſhip, or other goods
whereto he had but a defeaſible title, a
they be evicted after his death. So if h
left a Ship at the Sea with much good
and Merchandiſes which are drowned i
the returne, never ariving in ſafety.

So alſo if he left a flock of ſheepe,
tainted with the rot, which dye ſhortly
after him, in none of theſe three Caſe
doubtleſſe ſhal the loſſe fal upon the Ex
ecutor. But to put a Caſe of more doubt
what if a Leaſe for years come to an Ex
ecutor, ſubject to a condition for pay
ment of rent, or a ſumme in groſſe, an
the Executor failes in payment; whe
ther ſhall this loſſe fall upon the Execu
tor to be made good to Creditors, or Le
gatees out of his own ſubſtance, or not?
To this I muſt anſwer by this diſtinc
on, *viz.* If the Executor had taken the
profits of this Land ſo long as to furni
ſh him with mony for this payment,
or if he had other goods of his Teſtators
in his hands to ſupply the payment, then
is it his default that the money is not
payed, and he muſt bear the ſmart there
of, otherwiſe not; for he is not bound to
make payment out of his own goods,
yet

yet he is a ſullen and unkind Executor who will not ſo doe, when as he may repay and ſatisfie himſelf by the profits thereof after. Like Law, if the Executor ſuffer a bond of a hundred pound to be forfeit for not paying of fifty pound, having ſufficient in his hands. So alſo of a Recognizance, Statute, or Judgement, defeaſanzed upon payment of a leſſe ſumme; yea, I leſſe doubt of all theſe Caſes, then of the forfeiture of the Leaſe for years; for haply the Executor had time to have ſold the Leaſe, and made mony thereof, towards the payment of Debts, the omiſſion and neglect whereof may be imputed unto him as a default juſtly occaſioning recompence to be by the Law required from him. But perhaps he may excuſe himſelf that he could not find a Chapman who would give him to the value thereof: hereunto yet reaſon can eaſily reply, that it had been much better to have ſold it under the valne, then to have loſt the whole value, by expoſing or abandoning it to a totall forfeiture. Yet Quere.

CHAP. XI.

How farre, and where an Executor having Assets, is chargeable or liable to Action.

HAving considered what things shall come to Executors and be Assets in their hands, for the performance of the Will; Let us now consider what things the Executor is bound to pay, satisfie, or perform, and what not; where hee is chargeable, and where not; this being admitted, that he hath Assets, *viz.* sufficient wherewith to perform.

Here we will consider of these parts.

1. *Of debts by Specialty or Record.*
2. *Debts or dutes by contract without Specialty.*
3. *Debts without either contract or specialty.*
4. *Covenants by Deed or Specialty.*
5. *Wrongs done by the Testators.*

TOuching Debts by Specialty, which are the most usuall and common obliga-

obligements, it wil not be impertinent to give a little light touching the validity of a Specialty, and the extent of it to Executors. The most doubt will arise upon Bills, and such Writings Obligatory, made, not by Scriveners nor Clarks, in common forme, but by others, otherwise for haste, or through simplicity. Thus, long since we finde a Writing made by *A* to *B*. *Memorand.* that I have received of *B* ten pound, which I promise to pay, &c. This being sealed and delivered, was held a good Obligation by *Brian* and *Catesby*. So if the words had beene only, I shall pay to *B* ten pound; whether if such words or the like, as Covenant, or Grant to pay, be in the forme of a Bill or Bond, or in an Indenture or Articles, it is a sufficient ground for an Action of debt. And though it should be miswritten, *Wigint.* for *vigint.* or fifteene for fifteene, yet shall it be favourably construed, and held a good specialty of debt, as hath been resolved in these and like cases; and so also notwithstanding false Latine in the Obligation, or the plurall number for the singular number, or words of repugnancy or non-sense, yet if there be words whereby it appeares

22 E. 4. 22

19 R. 2. F. Dec. 166
9 H. 6. 7
2 H. 4. 8
23 El. 18. 5

9 H. 7. 16
2 H. 4. 8

that *A* is a Debtor to *B*, and it be sealed and delivered, it is a good writing Obligatory; yea, though it want the words of conclusion, *viz.* In witness whereof, as the Lord *Dyer* reports to have been resolved; although the contrary were held in four severall Kings times before, as our Books shew. Now any such Writing Obligatory doth determine or drown any duty by Contract, because speciality is of a higher nature; So as if *A* and *B* doe bargain with *C* to pay him a hundred pound for Corne or other thing, and after *C* take some such Writing Obligatory, as aforesaid of *A*. Now by this is *B* discharged of the debt, because he stood charged onely by the Contract, which is extinguished by the said Speciality.

As for the extent and operation of these Specialties, to, and upon Executors, we must know that an Executor doth so represent the person of the Testator, and is so included in him, as that every Bond or Covenant by the Testator made for payment of mony, or the like, reacheth to the Executor, although he be not named, *viz.* that hee doth not Covenant for, nor binde him and his

21 H 8 Dyer 22

28 H 8. Dy 19 & 22

40 E 3. 1

7 H 7. 14

8 H 6. 36

22 H 6. 15

21 E 4. 81

3 H 4. 17

11 H 4. 76

So reservation of rent, grant of annuity. 21 H 8 Dy. 14 & 22

47 E. 3. 22

32 H 6. 32

10 H 7. 18

Executors by expresse words (and yet the heir not named is not bound, though there be never so great Assets, or Land descend unto him.)

No mention of Executor in the judgment, yet he charged.

Now touching debts upon Record, much need not to be said, (except of those by Statute Merchant) for to debts and damages already recovered against the Testator, and to debts by Recognizance the Executors liableneſse is somewhat clear and conspicuous. Yet other inferior debts upon Record, may fitly be thought of as issues forfeited, fines, imposed by Justices, at *Westm.* or at Assizes, Quarter Sessions, Commissions of Sewers of Bankrupts, by Stewards in Leets, or the like; for all these are debts of Record, which Executors stand charged withall. So also if the Testator were before Auditors found in Arrerages of Account, being a Bailiffe or receiver: For these Auditors are by Statute, Judges of Record, but if the Account were made onely before the party to whom the Arrerage pertained, or but before one Auditor only, it is out of the Statute, which speaks of Accounts before Auditors in the Plural number. Therefore the Executor not chargeable, because the

9 H 6. f. 11
11 H 4. 64
92 Otherwise of a Garden in Soccage, he is out of the stat. W. 2 cap. 11. & credo Co. li. 10. 103

the Testator might wage his Law in the
cases, not in the former.

And whereas exception was before
made of a debt by Statute Merchant, it
was by reason that the Lord *Broke* tells
us that if the Conusor in that case be re-
turned dead, no remedy appeareth for
the Conusee to have execution of the
goods of the Conusor, but onely of his
Lands If this should be thus, it were a
very mischievous case: for many bound
in Statutes have no Lands but Leases, and
goods of great value, and if by their
death their goods and Chattels should be
set free from this Statute, and the Cre-
ditor without remedy, the Law were de-
fective: and it were so much the more
strange in this Case, because the Statutes
of *Acton*, *Burnell*, and *Mercatoribus*,
seem to pitch principally upon Goods,
and to tend unto assurance between Mer-
chants who usually are not Landed men.
But that the Law doth give remedy in
such Case, as well against the goods as
Lands of the deceased Conusor, appears
by the resolution of late made, in what
Order and Precedence Statutes are to
be satisfied by Executors, as after we shal
see.

36 H 8 Br. Stat. Mer. 45

Of

Of Debts by contract without Deed, as Leases Parol, &c.

COntracts are of divers kindes, and we will begin with those in the realty, as most worthy. If therefore one be Lessee for yeares, or for life, without any Indenture or Deed, (as he may be) and his Rent being behind, he dyeth, now is the Executor lyable to the payment of this Rent, without any Specialty, for that his Testator, if he had been sued in his life time, could not have waged his Law. But if the Lessee for yeares in his life time sell or grant away his terme or Lease, although he still lye at the stake for the Rent, to grow due after, until the Lessor accept the Assignee for his Tenant; yet if the Lessee dye, his Executor shall not be charged for any Rent due after the death of his Testator. But what if the Lessee doe not alien or assigne his terme, but dye thereof possessed, and the Executor perceiving the Land not to be worth the Rent, waiveth the same, yet the Lessor will not enter thereinto, nor intermeddle therewith, whether may he yet charge the Executor with the Rent,

21 H 6. 1
44 E 3. 42
44 E 3. 5
7 E 3. 11
14 H 7. 4 per Keble vide 8 E Dy. 247.
M. 32. & 33 Eliz. in com. ba.
Da. & Sm. 121.

Rent, during the terme? I answer, if he have Assets, that is, sufficient payment of this and other debts, he cannot waive this Lease, but shall be tyed to answer this rent, though much more than the Land is worth, for the taking of the Lease is much of the nature of an Obligation to pay mony; Yet because it is yearely Executory, the Executor may waive it, in case his Testators estate will not supply and beare that losse. But what if there be Assets to bear this yearly losse for some yeares, but not during the whole terme? I thinke in this case the Executor must pay the Rent, so long as this Assets will hold out, and then must waive the possession, giving notice to the Reversioner; and this I thinke he may doe well enough, notwithstanding his Occupation of the Land divers yeares after the Testators death, because that was not voluntary, but as of necessity; yet this I leave as a *Quære*, to be well advised of with good counsel.

Of Contracts Personal.

WHere the Testator might wage his Law, there the Action lyeth not against

against the Executor, as hath beene touched: and therefore he is not chargeable in an Action of debt upon a simple contract, as by reason of this or that to his Testator; yea though it were the Inheritance of Land which was sold, so as the sale were without Deed; or though by Deed, yet if no counterpart were under the hand of him to whom the sale was made. And the custome of *London*, to the contrary, *viz.* that an Action of debt should be maintained against Executors upon a contract, was held void, at least no good plea against other Creditors, that such a debt was recovered against the Executor, or paid by him, as was towards the latter end of the late Q. time resolved, though in the beginning of her time, it was a demurrer. Yea, though such a debt grew for the most necessary thing, *viz.* meat and drinke, which bindeth even an Infant to payment, yet will it not charge the Executor of a man of full age: but this is meant where the contract was only by word; for where the Testator puttteh his seale to any deed or writing made upon such sale, this is more than a simple contract, & taketh from the Vendee his wager of Law, and so chargeth the

41 E 3. 15
15 E 4. 29
Except by a *Quo minus* in the Exchequer, for the King's debtor. *Co. l.* 9 *f.* 98. *a.* So of accounts, except for the King.

M. 23. *&* 33 *El. in com. ba.* By three Judges, and 37 *Eli.* By all, as I finde in my report, but *Co. tl.* 5 *f.* 82. *b.* It is contrarily reported.
3 *El. Dy.* 196. Demurrer.
9 *E* 4. 51
10 *H* 7. 8
15 *E* 4 16
22 *H* 6. 13
39 *H* 6. 186.

the Executor. But if the Teſtator ſeal but unto a tayle or tally, with ſcotches expreſſing a debt, this is no ſuch Specialty as ſhall charge Executors. Yet in ſome Caſes without any ſeale at all, the Executor is chargeable. But although no Action of debt lyeth againſt the Executor upon ſuch a ſimple Contract, yet may the Creditor in that caſe, maintaine an Action upon the caſe, grounded upon the aſſumption implyed, though not expreſſed, as now ſtandeth reſolved by all the Judges of all the Courts at *Weſtminſter*, though heretofore there hath beene much difference of opinion thereabout: And indeed that the Executor is charged, in matter for a ſimple Contract, though not in manner of a Debt, but as for breach of promiſe, making recompence in damages inſtead of the debt. And the chief reaſon for it, is becauſe the Teſtator could not have waged his Law in this Action upon the caſe againſt himſelfe, though in debt he might. Where the Teſtator retaineth ſervants in Husbandry, or otherwiſe, and dyeth, there being wages due to theſe ſo retained, the Executor is liable to an Action of debt for the ſame, by

If the ſum be alſo written on it, they are bound as by a Deed 28 H 8 Di. 23. a Blades caſe. Co.lib. 4 Co.l.9.87 Pinchons Caſe

by reason that the parties were compellable by Statute, thus to serve, and therefore the Testator could not have waged his Law; but in case of Servants not compellable, as Waiters or Servingmen, as we call them, no action of debt lyeth against the Executor for their wages, though against the Testator himselfe it doth: for the Contract is sufficient to charge him who made it. See of account after. 2 H 6. 16. 11 H 6. 48. So 2 H 4. f. 14 Servitors in the warre by contract.

Where Executors shall be charged without either Contract or Specialty.

WHere a Prisoner oweth money to a Jaylour, or Keeper of Prisonfor his dyet, or victualls, and dyeth, his Executors shall be chargeable for this debt, because it is for the Commonwealth to have Prisoners kept, which cannot be without affording them victuals: Also, where one hath a Patent, or Tally of the Exchequer, to receive money of some Customer, Receiver, or other Officer of the Crowne, and delivereth it to him, he then having money of the Kings in his hands, if he pay not the same, but dye, his Executors shall stand char- 27 H 6. 4. 15 E 4. 16. Co. lib. 9. f. 87. b. No. n. br. 121 a. He must have a liberate also.

chargeable with the payment thereof. So for Arrerages of Account before Auditors, if more then one; but this is debt of Record in Law.

So if any Lord of free Tenants, doth levy aid of them for the marriage of his eldest daughter, and he die before she be married, she may recover this mony by an Action of debt against his Executor, but this is by vertue of a Statute. There is a President in the Book of Entries, of an Action of debt against the Executor of an Heir, by which it seems that a man binding himself and his Heirs, and leaving Assets, the Heir taking the profit, becomes so a Debtor, that his Executor shall be charged. And in the Register there is a Writ against the Executors of the Guardian of the Spiritualties of the Arch-Bishop of *Yorke*, for the debt of *B* who died Intestate, and whose goods came to the hand of the said Guardian, *viz.* the Dean of *Yorke*. In allowance whereof, there is a note added of the like writ, brought in K. *R.* 2. his time, and that then a president was alledged of such a Writ in King *Ed.* 2. his time, against the Executors of an Ordinary, and that they were inforced

to

to answer unto it. So is the opinion of *Trew* in the time of *Edward* the third. But *Ald.* opposeth him. Also the *Rationabile parte bonorum*, by custome in some places is maintainable for the Wife and Children, against the Executor. But no action of account lyeth against Executors, except for the King. More hereof, *tit. Wrong.*

11 H 4. Fit Ex. 77 See Co. lib. Intr. 564 such Action in Yorkeshire.

Of Covenants charging Executors.

WE have already touched upon Covenants in part, *viz.* where they be expresly for payment of money, shewing them to be in Law bonds, that is, Writings Obligatory, whereupon an action of debt may be brought, as well as an Action of Covenant, though the words of the Deed bear the sound and phrase of a Covenant. Yet in some Cases no action of debt lieth upon a Covenant to pay money: as if *A* covenant, that his Executor shall within a year or such a time after his death, pay ten pound to *B* now for that no Action or Debt was maintainable against *A* himselfe, it lieth not against his Executor, but onely an Action of Covenant, as was held in the late

Inter Andrewes & Elserigge circster 33 Eliz.

Pas. 33 Eliz. inter Bor. & Austin. in com. ba.

Queens time. So if the Covenant be conditional, as thus, that if *C* doe not pay to *B* ten pound, then *A* will pay it: and ſo alſo perhaps, if the Covenant be in the diſtinctive, *viz.* to doe ſuch an act or to pay ten pound, now if the act be not done, yet no action of debt lieth for the mony, but only an action of Covenant. But now let us come to the Caſes of meer Covenants, and ſee which of them will charge an Executor, and which not. If a Leſſee for years covenants to repair the buildings, or to pay the Quit-rents iſſuing out of the Land let, there is little doubt, but the Executor to whom the terme cometh, muſt as well as his Teſtator, performe that Covenant, although he did not Covenant for him and his Executors: and yet of theſe caſes doubt hath been; and touching the latter, *viz.* of paying Quit-rents, divers Juſtices in Queen *Maries* time, were of opinion that it was a thing ſo perſonall, that it died with the perſon, and did not charge the Executors; Nor is there any contrary opinion expreſſed in the Book. And ſince that time, *viz.* towards the end of Queen *Elizabeths* Reign, in the Action of Covenant between the Dean and Canons of *Windſor*

Quæ. if both bee to bee done by the covenanter, viz. ten l. if not five ſuch a day. So in *Penals* Caſe. But where the Leſſor did Covenant to pay the quit-rent, divers Juſtices thought the Executor not named was not bound, 1. & 2 P & M Dy. 114 Note the Caſe is as *ſupra* in marg. Paſ. 38 El. in banco reg.

Windsor, and *Hide*, touching reparations, at the first, much opinion was, that only the person Covenanting was tyed to this performance, but after it was resolved that that Covenant did run with the estate, and so both Executor and Assignee bound to performance; but in that case it was said by *Popham* chief Justice, that if the Covenant had been to do a Collateral act, neither the Executor nor the Assignee had been tied thereby; and therefore where a Lessee for years covenants within such a time to build a new house upon the land, and dies before that time expired, I doubt whether the Executor be bound to perform this, or not; although it do concern the Land let, so as perhaps the Rent or Fine was the lesse in respect of this charge of new structure or building, which is a great reason that the Executor, though not named, should be tied to the performance: But if the Covenant had been to build a house elsewhere then upon the land let, or to do any other collateral thing, not pertinent to the Land let, it is cleer the Executors were not bound to perform it: and yet in those cases, if there were a breach or non-performance in the Testators life time,

Co. l. 5 f. 44

Resolved P 39 Eliz. but not adjudged till M 43 & 44 Eliz.

as that the time of performance were expired before his death, then it is clear the Executors were bound to yeild recompence by way of damages recoverable in an action of Covenant, as both *Shelley* and *Fitzherbert* agreed, and so also did the Lord *Popham* agree in the said case of *Hide*, as I find in my own Report of that Case, though in the Lord *Cooke*, reporting only the point in question, that be not mentioned; Now let us consider of the case, where there is no expres Covenant at all, so much as for the Lessor himself, but onely a Covenant implyed, or Covenant in Law, as we call it. As if Lessee for life, make a Lease for yeares, and die within the terme, so as the Lessee is evicted by him in reversion, or remainder. In this case it was resolved in the late Queens time, by three Justices, *viz. Walsh*, *Brown* and *Dyer*, that by this Covenant in Law, the Executors were not chargeable; and in the same case the Lord *Dyer* sets down another resolution after, to the same effect: but Master Serjeant *Bendloes* reporting this latter case to be of a Lease made by Tenant in tail, *viz.* before the Stat. of 32 *H.*8 or not warrantable by it, sets down the

Tr. 28 H 8 Dy. 14. There the house was to be built upon the Land leased, and yet *Baldus* seemed of a contrary opinion.

M 8 & 9 El. Dy. 257 Incrat. M 7 & 8 Eliz. fol. 11. 37 *Swanne Vest. Strangsham & Searles.*

the opinion contrarily, *viz.* that the action was maintainable againſt the Executor. This may ſerve for inſtance, the like being in any other caſe, where the Leſſor hath not a good and a firme title, but perhaps ſubject to a Condition or other eviction, ſo as the Leſſee cannot enjoy the Land according to his Leaſe. But this muſt be ſo underſtood, that no eviction, or breach of Covenant, is in the life of the Teſtator himſelfe, for if that be, there is no queſtion but the Executor ſtands chargeable; and therefore if one make a Leaſe of Land by Deed, wherein he hath nothing; this Covenant is perhaps preſently broken, and though the Leſſor die before an action of covenant brought it will be maintainable againſt his Executor, though no expreſſe Covenant. This is uſefull to be known, though in theſe daies there befew leaſes ſo made, without expreſſe Covenant, and the Executors alſo named. And where there is a ſpeciall Covenant in expreſſe words, it doth qualifie the Covenant implied, ſo as although words of demiſe and grant tie the Leſſor to a general warranty of the title againſt all men, yet it being after Covenanted, that the Leſſee ſhall enjoy againſt the

Tr. 22 El. rot. 459 inter Broderidge & Windſor.

Note and Anders caſe.

Lessor and his Heirs, or against all, claiming under him or his Ancestors; Now no eviction by or under any other title, giveth cause of Action, or bindeth the Lessor or his Executor to make recompence.

Of wrongs done by Testators, and whether Executors be liable to amends.

ALthough Executors doe represent the persons of their Testators, yet if the Testator commit any trespass upon the goods of another, or upon his person or Lands, no action lyeth for this against the Executor, for *Actio personalis moritur cum persona*; So if a Sheriff, Jaylor, or keeper of Prison, suffer one in execution for debt or damages to escape, though hereby the party, at whose suit the Execution was, be intituled to an Action, *viz.* an action upon the case against such Officer, by the Common Law, and by Statute an action of debt; yet if he so suffering die, for that such sufferance was a wrong of the nature of a trespasse, no action lieth against his Executor for the same. And upon the same reason, as I presume, if one carry away his Corn and Hay without setting out the Tenth, although the

41 Ass. p. 15-40 E 3 Fitz. Ex. 74 Co. lib, 9. f. 87 a.

the treble value be recoverable againſt him in an action of debt, yet if he die before ſuch recovery, the Action is gone, and lieth not againſt his Executor; No not although the Teſtator were a Leſſee for yeares, ſo as his ſtate came to his Executor.

Like Law in other penal Statutes, as for arreſting one at the ſuite of *I S* without his privity or aſſent; Or for not appearing as a Witneſſe, being ſerved with a *ſub pœna*, and having charges rendered, and many like; yea, if a Leſſee for years commit waſte and die, no action lieth againſt the Executor for this waſte; for all theſe caſes are within the rule of *Actio perſonalis moritur cum perſona*, and many other like Caſes might be put, but theſe may ſuffice. Yet if a Parſon, Vicar, or other Spirituall or Eccleſiaſticall perſon do ſuffer a ruine or decay of the houſes or buildings upon his ſuch ſpiritual benefice or promotion, and dieth, his Executors are liable, by the ſpirituall or Eccleſiaſticall Law, to the ſucceſſors ſuite for amends to the repairing of ſuch ſpoil or decay. And becauſe ſome uſed fraudulently to grant away their goods, ſo as nothing ſhall be left to their Executors,

13 El. c. 16 it was enacted *temp. Elizabethi*, that ſuch Grantees of Goods ſhould be liable to the ſucceſſors ſuit, for theſe *dilapidations*, as if they were Executors.

As for one other caſe of this nature, *viz.* where an Executor waſteth the goods of his Teſtator, ar an Adminiſtrator of the goods of his Inteſtate, and dieth; Whether his Executor be ſubject to Action for this or not: I adjorn the Reader to that place where I ſhall treat of ſuch waſting, or devaſtation by Executors.

Unto this head, not unfitly, may be referred, what before is ſaid of Actions againſt the Executors of the Debtors heir, and the Executors of the Ordinary, for the Specialty binding to payment, reacheth not to any of theſe; but becauſe their Teſtators ſhould have payed theſe debts, with the goods or profits of the Lands of the Debtor, and did not, but retained them to themſelves; therefore for this as a wrong, are they ſuable, as I take it. So alſo by the ſame reaſon are the executors of an Adminiſtrator chargeable where he did neither pay the debts, nor leave the goods to the next Adminiſtrator, but otherwiſe diſpoſed of them. Yet an Executor is not chargeable in an action

Firz. Ex. 77

I conceive no difference between this and the other caſes, ſupra.

ction of *Detinue*, nor of account (except to the King) for the Teſtators detaining, not paying or anſewering things received, or under his charge.

2 H 4. 13 He may by admit. Co. l. 11. f. 88

3 H 6. 35 Con. for Arrerages of an account before auditors 11 H 5. 64. 91 92. 9 H 6. 11 13 Ed. 1

And the Reaſon why, after account made before Auditors, and the Bailiffe, or receiver be found in Arrerages and die, that in this caſe his Executor is chargeable, is, becauſe the Auditors are made Judges by the Statute, *Weſtm.* 2. *cap.* 11. ſo this Arrerage which they have judged, is a debt by Record.

But if the caſe be put on the otherſide, *viz.* that the Bailiffe, or Receiver, have found in ſurpluſage upon his Account, *viz.* that he hath laid out more in his Lords or Maſters buſineſſe, then his receipts amounted unto, and then his Lord or Maſter dieth, now ſhal not he have any action againſt the Executors, for the ſurpluſage, becauſe it is out of the purview of the ſaid Statute.

Co. lib. 9. f. 87 a.

CHAP.

CHAP. XII.

Of the Order and method to be used by Executors in payment of debts and Legacies, so as to escape a devastation or charging of their owne goods.

WE have gone through and dispatched the two first proposed parts, *viz.* 1. Touching the being of Executors, and the manner of their being. 2. Their having, and the manner of their having. We come now to the third part, *viz.* their doing or disposing of the Testators estate.

Now this consists principally in the issuing of money, though partly also in delivering or assenting to the execution of Legacies, not being money but other goods or Chattels bequeathed.

Money is to be issued by Executors, foure wayes ordinarily.

About the funeral of the Testator.

About proving his Will.

In paying of debts.

In paying and satisfying of Legacies pecuniary.

As

As for the firſt, burialls be as of neceſſity, for two reſpects, *viz.* 1. Of charity to the dead, that he may be Chriſtianly and ſeemingly interred. 2. To prevent and avoid annoyance to the living, who by the very view of dead carkaſes, would both be affrighted, and within a few dayes diſtaſted at the noſe. We know that under the Law, the touching of a dead carkaſe made a man uncleane and to need purifying: nor can we eaſily forget what the ſiſters of *Lazarus* ſaid to our Saviour touching their brother, when he had beene dead three or four dayes: *viz.* that the taking of him then out of his grave muſt needs bring a noyſome ſavour. Hereabout therefore, ſome expence is neceſſary, and that not onely for fees to be paid, which in *London* amounts to a conſiderable ſumme, ſpecially for ſuch as are to be buried within the Church, but alſo otherwiſe, *viz.* for the Pall or Herſe-cloath, the ringing, &c. As for feaſting, and banqueting, it ſeems not to me congruent to the ſadneſſe and dolefulneſſe of the action in hand. But howſoever that be, yet where the Teſtator leaves not ſufficient goods to pay his debts, feſtival expence is to be forborne,

ex-

except the Executor will out of kindneſſe beare it with his owne purſe; for dead debtors muſt not feaſt to make their living creditors faſt. I mentioned a conſiderable amount of funeral fees payable in *London*, and ſurely (to let my thoughts fall back upon it a little) it is worth conſideration, whether in that kinde, and eſpecially for thoſe who dying there, are yet carried into their countries to be buried, the exaction be not either unjuſt altogether, or too oneroufly exceſſive: ſo alſo for much ringing contrary to the Canon made at the Convocation in the firſt yeare of King *James*.

The next thing mentioned to juſtifie and occaſion expence, is the proving of the Will: But this way a greater diſburſement (except for riding charges, or by reaſon of oppoſition by a *caveat* put in or the like) will not ſtand allowable then is preſcribed by the Statute made in the time of *Hen.*8. whereby the fees of Ordinaries, and their Scribes, Regiſters, and Officers be limited. And it is ſtrange that theſe bounds have beene ſo much and ſo frequently broken and tranſgreſſed; the rather, for that long before in the time of K. *Ed.* 3. by an Act of Parliament, it is pro-

21 *Hen.* 8 cap. 5

13 *Ed.* 3. c. 4

provided that the Kings Juſtices ſhould as well at the Kings ſuit, as at the parties grieved, enquire after ſuch oppreſſions, or extortions, for ſo they be called; yea St. *Germ.* who was no ſtranger to the civil and cannon Law, as appeares by his book ſaith that the Ordinary ought to take nothing for the probate, if the goods ſuffice not for funeral and debts; but he means only that conſcience is againſt it. Do. & Stu. li. 2. cap. 10

Now we come to the third occaſion of disburſment, *viz.* payment of debts, which is the maine part of our buſineſſe. We have before ſeene what debts lye upon Executors, having aſſets to pay them; we are now to ſee in what order they muſt pay them, as well *Ut ſine fidi diſpenſatores*, as for their owne indempnity, *ne quid res ſua capiat detrimenti.* To put our ſelves into the better order or method of handling theſe things, we will ſort out debts into their ſeveral kinds thus.

They are of theſe three ſorts, *viz.* either,

Debts of or upon record.

Or debts by ſpecialty.

Or debts without ſpecialty.

The debts upon record may be againe divided into foure ſorts or kinds, *viz.*

Debts to the King or the Crowne.

Debts

Debts by judgement or recovery in ſome Court of record.

Debts by recognizance.

Debts by ſtatute ſtaple, or ſtatute merchant.

Amongſt theſe, the debts of the Crown are to have the firſt place of precedence, ſo as if there be not come to the Executor goods of greater value then will ſuffice for the ſatisfaction of theſe, he is not to pay any debt to a ſubject; and if he be ſued for any ſuch, he may plead in Barre of this ſuit that his Teſtator died thus much indebted to the King, ſhewing how, &c. and that he hath not goods ſurmounting the value of that debt. Or if the ſubjects purſuit be not ſo by way of action, as that the Executor hath day in Court to plead, but be by way of ſuing execution, as upon ſtatute merchant, or ſtable, then is the Executor put to his *audita querela*, wherein he muſt ſet forth this matter. And there is great reaſon why the Kings debts ſhould thus be preferred before any ſubjects, *viz.* for that the treaſure Royal is not onely for ſuſtentation and maintaining of the Kings houſhold, but alſo for publick ſervices, as the warres, &c. as appeares by the ſtatute,

M 33 & 34 Eliz. the Lady *Walſingams* caſe in com. ba. & Tr. 39. *El.*

tute, 10. *Rich.* 2. *cap.* 1. And therefore it is, as I conceive, that *Bracton* ſaith of the treaſures or revenues Royal, *Roborant coronam*, they do ſtrengthen or uphold the Crowne. And for the like reaſon, as I thinke, did God inact touching the poſſeſſions of the Crowne, that if they were given to any other then the Kings owne Children, they ſhould revert and come back to the Crowne the next Jubilee, which was once in fifty yeares, *ſed de hoc ſatis*. But this priority of payment of the Kings debt before the debt of any ſubject, is to be underſtood only of debts by or upon record due to the King, and not of other debts. If any aske how the King ſhould have any debts which ſhall not be of record, ſince by the ſtatute 33. of King *Hen.* 8. *cap.* 30. it is inacted that all Obligations and ſpecialties taken to the uſe of the King ſhall be of the ſame nature as a ſtatute ſtaple: To this I anſwer, that there may be ſummes of money due to the King upon woodſales, or ſales of Tinne, or other his mineralls, for which no ſpecialty is given; ſo alſo of amercements in his Courts Baron, or Courts of his Honours, which be not Courts of record: The like of fines

Lib. 1.

21 E 4. 21
22 So muſt it be pleaded M. 33 & 34 Eliz.

fines for coppyhod ſtates there. So of the money for which ſtrayes within the Kings Manors or Liberties are ſold. Alſo as the Law hath lately beene taken and ruled in the Exchequer, even debts by contract due to any ſubject, are by his outlawry or attainder forfeitable to the Crowne. Yet neither theſe nor thoſe due to ſuch perſon outlawed or attainted by bond, bill, or for arrerage of rent upon leaſe is or can be any debt of record until office thereupon found; for although the outlawry or attainder be upon record, yet doth it not appeare by any record before office found that any ſuch debt was due to the perſon outlawed or attainted. Thus are not theſe debts to the Crowne to have priority of payment before the ſubjects debts, though the Kings debts of record are ſo to have; ſo that if a ſubject to whom the Teſtator was indebted by ſpecialty ſue for this debt, the Executor muſt plead that the Teſtator dyed indebted thus much to the King by record, more then which he left not goods to ſatisfie; if the truth of the caſe be ſo, for if there be ſufficient to ſatisfie both, then the ſubject creditor is not to ſtay for his debt till the Kings debt

And muſt plead the record in certaine as was held in the caſe of the Lady *Walſingham*, M. 33. & 34 Eliz. but it ſuffiseth ſay, by a record of the Exchequer as was held Tr. 39 Eliz. in ban. reg.

debt be levied. And if the subject credi-
tor sue execution upon a statute, so that
the executor hath no day in Court to
plead this debt to the King, then is the ex-
ecutor put to an *audita querela*, wherein
he must set forth that matter, and so pro-
vide for his owne indemnity. But what
shall we say of arrerages of rent due to
the King? surely, where it is a fee-farme
rent, or other rent of inheritance, I see not
how it can come under the title of debt,
since for it no action of debt is maintain-
able so long as the state continueth in
him to whom it grew due; and I find that
the Lo. *Dyer*, *M.* 14. *Eliz.* said, that the
King could but onely destraine for his
rents, and not otherwise levy them of
lands or goods; and that the King by his
Prerogative may distraine in any other
lands of his tenant, our books tel us, but no
more: yet I know it hath been otherwise
done of late in the Exchequer, which if it
have been the ancient and frequent use of
the Exchequer, it wil stand as law, though
unknown to the *Lo. Dyer*. Now rent upon
a lease for years differeth from the other,
since for the arrerages therof an action of
debt lieth, but how can either of these be
debts of record, when the not paiment may

be either in the Court of Exchequer,
to the receiver general or particular?
how then can there be any certain rec
of the not payment, so as to make
certain debt upon record? We know
tutes have been made to make the la
of receivers subject to sale for satisfac
on to the Crowne; and besides that, so
ancient Patents direct the payment
Fee-farms into the hands of Sheriffs
the statute of *Westm.* 1. *cap.* 19. provid
remedy for the King against Sheriffs
answering the debts of the Crowne
them received: so as the Kings Farm
or debtor may have paid his rent or oth
debt, and the Crown have not yet rec
ved it. Of fines and amerciaments in
Kings Courts of Record, there is
doubt but they are debts of Record.

Come we now to the debts of subject
and first those of Record; touchi
which, I shall not be able to hold
good a method, and so well to hand
things by part as I would, for that
parts so stand in competition one with
another for precedencie, as that they m
of necessity thereabout conflict and
terplead one with the other, and cont
one against the other: yet for the Re
den

better ease and ability to find out which may concern him in his particular case, I will in the best sort I can, single out these things into several parts, and place them in several rooms or stations. First, considering how it shall stand between one judgment and another had either against the Executor or Testator. Secondly, how between judgments and statutes or recognizances. Thirdly, how between recognizances and statutes. Fourthly, how between one recognizance and another. Fifthly, how between one statute and another, adding to each some observations incident.

Now next to the debts of the Crown are judgements or debts recovered against the Testator, to have priority of precedency in payment, as being of an higher nature, or more dignity than any other, for that statutes and recognizances, though they make debts upon record, yet are they begotten but by voluntary consent of parties; whereas in every judgment there hath been a course and work of Justice against the will of the defendant, as is presumed, and this in a court of justice; and the records of such judgments are entred in publick rolls, not kept or carried

in pockets or boxes as statutes, as until inrollment recognizances are. Therefore executors must take heed that judgments against their testators (before debts any other way) if they have not sufficient for both be first satisfied; lest they draw the burden of this debt upon their own backs. Now their way to help themselves, being sued or pursued for other debts is the same before delivered touching debts upon record to the Crown, *viz.* by plea, where they may plead; as in *Scire facias*, upon a recognizance or suit upon band, and by *Audita querela*, where they cannot plead, as when execution is sued upon a Statute. And if they had no warning in the *Scire facias*, but upon *nihil* returned the judgment passed, there also the executor may be relieved by *audita querela*; because there was no default in him that he did not plead or set forth the judgment upon the suite in the *Scire fac.* Nor will it be any plea for the Creditor by statute to say, that his statute was acknowledged before the judgment, and so is more ancient, for a latter or more puisne judgment is to be preferred before a statute in time precedent. But if this judgement be satisfied, and it onely

Co. li. 5. f. 28 So *Wray* and *Gaudy* inter *Bond* and *Bales*. 28 El. vel circer

Yea though a writ of error by the executor to reverse the judgment, yet suffering a statute to be executed must pay of his owne. *Read* and *Bearblocks* case, p. 43 Eliz. *Ba.* re. So held in *Reads* case supra. vide 12 H 7 Ke w. 24, 25 to like purpose.

Co. lib. 4. f. 59. So *Petiam* in com. ba. inter *Charnock* & *Wolsley* 34 Eliz. vel circiter.

kept on foote to wrong other creditors, or if there be any defeasance of the judgment yet in force, then the judgment will not avail to keep off other creditors from their debts: And thus much touching debts by judgment, *viz.* how they stand in priority before other debts by statute or recognizance. Now to see how they stand among themselves, let this be observed, *viz.* that between one judgement & another had against the testator, precedencie or priority of time is not material, but he which first sueth execution must be preferred, and before any execution sued, it is at the election of the Executor to pay whom he will first; yea, if each bring a *Scire fac.* upon his judgement, the executor may yet confesse the action of which he will first, notwithstanding the *Scire facias* was brought by the one before the other. In this *Sci. fac.* the defendant may plead generally that he hath fully administred before the *Sci. Fac.* brought, without shewing that hee did administer in payment of debts of as high nature; yet that must be proved upon the evidence, else the trial wil fal out against the executor. Thus have I delivered the most material things in my apprehension

Co. l. 5 f. 18
Co. lib. 8 f. 132.
So held in 15 & 16 El. so in the *Scire facias*, by *Bond* against *Bales* it was held.

hension touching debts by judgment, yet thereabout I will adde for the better information of the Reader, not studied in the Law, these few things. First, that what hath been said is only to be understood of judgements against the testator, and not of any against the Executor himself, for of those, being but debts by specialty at the time of the Testators death, we shall speak after. Secondly, what is said of the testator in case of an Executor immediate, is likwise to be understood of the testators testator in case of the executor of an executor: for where *A* makes *B* executor, & *B* makes *C* executor, there the goods which came from, or were left by *A*, be not in the hands of *C* liable to judgments had against *B*. Nor on the other side, are the goods of *B* in the hands of *C* subject to the judgments had against *A*. And the like is to be understood of statutes, recognizances and bonds, as elsewhere is somewhat touched. Thirdly, Recoveries or judgments by meer confession without defence, are yet of the same nature, and to have the same respect as other recoveries upon trial or otherwise; for although they may seem to be but of the nature of recognizances, which be *debita*

9 El. 4. 14, 15 Quære of arrerages of account before auditors without suit: for the executors are charged by judgment of the Auditors, by st. 1. W. 2 judg. of record 10 H 6. 24 25 Bre. der. 183

recog-

recognita, yet do they differ from them, in that here a debt is demanded by a declaration which is intended true, and that therefore the defendant cannot deny it: but in case of a recognizance it is not so; for there usually no action is entred, nor debt demanded. Fourthly, the foresheved respect to debts by judgment, is not to be inclosed within Westminster Hall, and be restrained to the four Courts there, but may and must extend it self to judgments in other Courts of Record, *viz.* in Cities and Towns Corporate, having power by Charter or prescription to hold plea of debt above forty shillings, as in London, Oxford, &c. For although there execution cannot be had of any other goods than such as be within the jurisdiction of that Court, yet if the Record be removed into the Chancery by *Certiorari*, and thence by *Mittimus* into one of the Benches, so execution may be had upon any goods in any County of *England*. Fifthly, in case where the testator was bound in a recognizance and a *Scire facias* brought against him, and thereupon judgement given; although this judgment be not *quod recuperet*; as in case of actions of debt, but *quod habeat executionem*,

Quere of judgement in a writ of Annuity for arrerages after.

nem; yet since execution is the life, fruit, & effect of all judgments, this may now well stand for a debt by judgment, as I take it.

Of Recognizances and Statutes.

NExt unto debts by judgment, are those by statute or recognizance to be regarded by the Executor. And because I find no difference of priority or precedency between these two, I therefore rank them together; yet one reason of preferment given to judgments before statutes in *Harison's* case, *viz.* that the one remaines a Record upon a roll in the Kings Court, whereas the other being carried in the pocket of the conusee is more private; this I say, should give priority also to recognizances before statutes. As also another reason, for that statutes are not properly records, but obligations recorded; yet do I not find that this makes a difference for priority of payment. And indeed the statute is the more expedite remedy, since thereupon execution may be taken out without any *Scire fac.* or other suit, which cannot be in the case of a recognizance, for there if a yeer be past after the acknowledgment, no execution can be sued out against the

ty himself acknowledging it, without *Sci. fac.* first sued out against him: And if he be dead, then though the year be not past, yet must a *Scire facias* be sued, and thereupon the executor defendant may plead some plea to hold off the execution for a time. But this notwithstanding, the executor may satisfie the recognizance before the statute, at least if he do it before execution sued thereupon; for they standing in equal degree, it is at his election to give predencie and preferment to whether he will. Neither is it material which of them were first or more antient; nor between one statute and another doth the time or antiquity give any advantage as touching the goods, though as touching the Lands of the conusor it doth; but as for his goods in the hands of his Executor, whosoever first getteth hold of them by his execution, shall have the preferment. And before suing of execution, the executor may give precedence or preferment to whom he will. But now some may object, that there is no course nor writ of execution for any such conusee against the executor, & if so, then statutes merchant, and of the staple, are in vain spoken of, and it is true that Master

Before *Sci. fac.* not after voluntarily, but if levied by writ of Extend. fa. good.

Brooke

Bro. No. c. 194 & Stat. Mar. 43.

Brooke, after Chief Justice of the Common Pleas, in his new cases professeth that he knew not any remedy for the creditor out of the goods of the conuster after his death. But if this should be so, the Law were very defective, since the substance of many, especially of merchants, for and among whom the statute merchant was provided, consisteth usually more in goods then lands; besides the plea of *Harrison*, administrator of the goods of *Sidney*, in bar of *Greenes* action of debt upon an obligation, *viz.* that the intestate stood bound in a statute staple to *I. S.* and *Greenes* reply thereunto, that there were Indentures of defeasance, no covenant whereof was broken; and the resolution of the Judges that the said matter in the replication was good to avoid the defendants plea; All this, I say, (and the resolution of the Judges of the Common Pleas in that case, and in the case between *Pemberton* and *Barnam*, as also in the Kings Bench by *Popham* and the rest of the Judges, that Executors must satisfie judgements before statutes, and statutes before obligations) had beene idle, and savouring of grosse ignorance, if no execution at all

Co. l. 5. f. 28 b H 40 El. rot. 119

P 32. El. rot. 135. in co. b.

could be had against the Executors of him bound in a statute; and then should *Greene* have demurred upon the plea of *Harrison*, and needed not to have pleaded that other matter; but none of the Judges or Serjeants ever conceited any such matter: that which there was replyed, *viz.* that the statute was not forfeited, is here to be remembred, as good matter both against statutes and recognizances, and that whether the recognizance have a defeasance or a condition not broken, so that the recognizance is not forfeited. In none of these cases is the Executor hindered from payment of debts by specialty, nor can he be justified or excused if by colour thereof he refuse so to doe; and indeed else might creditors be exceedingly defrauded by recognizances for the peace and of good behaviour, &c. and so by statutes for performing covenants touching the enjoying of Lands, if these should keepe off the payment of debts, and yet themselves perhaps never be forfeited, nor the summes become payable.

See Co. lib. 5 91 executi. on against an Exec. upon a statute. Semaines case.

Co. lib. 5. f. 28 So if satisfied, though not discharged.

of

Of debts by ſpecialty.

NOw come we to debts due by ſpecialtie, *viz.* Bond or Bill (of which nature the greateſt number of debts are:) let us then ſee what courſe the Executor muſt or may hold for ſatisfaction of theſe, admitting that the Teſtator ſtood not indebted by any record, or that no forfeiture is of any ſuch debt, or that there be goods in the Executors hands above the amount of ſuch debts by record. This I ſay, *dato*, then according to the rule, *Proximus quiſque ſibi*, the Executor may firſt ſatisfie himſelfe of ſuch debts, as the Teſtator by ſpecialty owed him: for ſuch debts are not releaſed by the creditors taking upon him to be Executor to the debtor; though on the other ſide if the creditor make his debtor Executor, this is a releaſe of the debt. Although it be given out or commonly ſpoken in the general, that an Executor may firſt pay himſelf, yet is it to be underſtood with this caution or condition, *viz.* That the debt to him be of equal height or dignity with the debts to others, according to the rule, *In æquali jure melior eſt conditio poſſidentis*,

fidentis, for if his teſtator were indebted to other men by any ſtatute, judgment, or recognizance, & to him whom he maketh Executor only by bond, or other ſpecialty, then may he not firſt pay himſelf, that is, by paying of himſelf leave them unpaid whoſe debts are of an higher nature, but if there be ſufficient for ſatisfaction both to them and himſelf, then is it not material which be firſt paid. Now touching the debts to other men, the Executor hath power to give preferment in payment to whom he will; ſo that if the Teſtator left but 100. *li.* being indebted to *A* 100. *li.* and to *B* 100. *li.* by ſeveral obligations, the Executor hath power to pay *B* his whole debt, and to leave *A* altogether unpaid any part of his debt, ſo as he have not commenced any ſuit before payment to *B*. But yet herein this difference is to be taken and obſerved by Executors, that if the time of payment upon the bond of *B* were not come at the time of the Teſtators death, then may not the Executors before the mony to *B* become payable, pay him & leave *A* unpaid, whoſe money was preſently due. Yet if *A* forbear to demand or ſue for his debt till the debt of *B* become alſo payable, then

18 H 8. Dy. 32. Doct. & St. ca. 10. p. 78.

is it at the will of the Executor to pay whether of them he will; so as the other may lose his whole debt, if the goods will not suffice to pay both. What if *A* have onely by word demanded his debt, and not by suit, before the debt to *B* become payable, whether doth that hinder that the Executor may not now when the money to *B* is also payable, pay him and leave *A* unpaid? And hereunto S. *Germ.* answereth negatively, making this verbal demand to be idle and of no value: yea, he addeth, that if *A* have commenced suit before the debt to *B* become payable, yet if the Executor can delay the suit till the debt of *B* become payable, so that *A* can get no judgement before that time, and before *B* hath commenced suit upon his band, then may the executor confesse his action, and so pay his debt, leaving *A* unpaid. But of this I make some doubt, for that I find in 9. of King *Edw.* 4. some admittance, that if *A* having a Tally, Patent, or other Warrant from the King for receipt of money, of or from a customer or receiver where other had like warrants before him, but *A* maketh the first demand, now must the officer first pay him,

Do. & St. p. 78 Quære If then he may not plead this judgement *post ult.* contin. against *A* as he may plead it against other suits after commenced. Co. li. intr. 148. 269 [illegible]

him, or elſe himſelfe ſhall become debtor to him, if he firſt pay others, whoſe demands were after made, though they had warrants before A. Likewiſe there is, as to me it ſeemes, ſome admittance in the ſame booke, that the very demand made by a creditor of his debt from an executor, who hath then aſſets in his hands, doth intitle the creditor to recover damages againſt the Executor out of his owne goods; which if it ſo be, then doth even the verbal demand lay ſome tye or obligation upon the Executor for payment. But hereabout I lay downe nothing peremtorily. We partly may diſcerne by the premiſes how the Executor is to guide himſelfe, in caſe where there be divers debts by ſpecialty all due, and payable at the Teſtators death: before any ſuit commenced for any of them: for in that caſe clearely the firſt verbal demand gives not any precedence, all being due, and ſo ſtanding in equal degree; And this is implyed in many bookes, making the commencement of the ſuit onely that which intitles to priority of payment, or at leaſt reſtraines the election of the Executor. Yet admit that one creditor firſt doth begin ſuit, if

41 E 3 Fitz Ex. 68. & 9. Bl. Dy. 232 vide 21. H 7 Kelw. 74.

others

5 Hen. 7. 17 So Walmsley inst. P. 39 Eliz. in Error. al. Serjeants Inne. Co. li. Intr. 269. such a recovery by confession is pleaded against another, & admitted good &fo. 148, 149. Do. & St. p. 78. b.

others also after sue before he be paid or have judgement; now cannot the Executor pay him first, who first commenced suit, but he who first hath judgement must first be satisfied. And the Executor may herein yeild helpe to one before the other, *viz.* by essoignes, emparlances or dilatory pleas to the one, and by quick confession of the others action, for he is not bound against his will to stand out in suit, and expend costs where the debt is cleare, nor is this covin but lawful discretion, which conscience will also approve, some good consideration inducing. Nay after suit commenced, yet until the Executor have notice thereof, he may pay any other creditor, and then plead that he hath fully administred before notice. Nor is the Sheriffes returne of summons or distress sufficient cause of notice, for the summons might perhaps be upon his Land: but if it were to his person, it is notice sufficient; and then to save himselfe, he must say that he was not summoned till such a day, before which he had fully administred; yet doubtlesse the Executor may be arrested at the creditors suit in some sort, which yet shall be no sufficient notice of the debt.

As for the purpose, if he be sued by *Latitat* out of the Kings bench, this supposing a trespasse, gives no notice of a debt, so also of a *Subpœna* out of the Exchequer; but the original returnable in the Common-pleas expresseth the debt, and so in some sort do the processe thereupon. And there it seems by some books, that if it be laid in the same County, where the executor dwels, he must take notice of it at his own peril. But this I take not to be Law, nor is there any great opinion that way: and although to make it more cleer, the Executor in King *Hen.* the fourth his time, estranging himselfe from notice of the suit before payment to others, did alledg that the action was laid in a forraign County; that is no great proof that if his abode had beene in the County, where the Action was brought, he must have taken notice; but thus it was cleerer, and a little surplusage hurts not. So also said Tr. 38 Eliz.

Now betweene a debt by obligation, & a debt for rent or damages upon a Covenant broken, I conceive no difference nor any priority or precedency, but it is at the executors discretion to pay first which he wil, as if all were by bond. So also

of rents behind and unpaid, as I conceive but touching them, principally intending rents upon leases for years, divers considerations are to be had, and some distinctions to be made: as first, between rent behind at the time of the testators death of which that before said is to be understood, and that which groweth behind after, next between suit for the rent by action of debt, and by distress and avowry. As to the first difference, if the rent grow due since the testators death, then is it not accounted in Law the testators debt for only so much is in Law accounted assets to the executor as the profits of the lease amounted to over and above the rent, so as for that rent so behind the executor himself stands debtor, as hath been resolved, and therefore he is suable in the *Debet* and *Detinet*; whereas for rent behind in the Testators life, and all other the debts of the Testator, he must be sued in the *Detinet* onely. Hence it must follow, as it seems, that an executor sued for debt upon bond or bill, cannot (except in some special cases) plead a paiment or recovery of rent grown due since his testators death; though of rent behind at the time of his death it be otherwise. And yet

here again another difference or diſtinction is to be taken, *viz.* where the profits of the leaſe exceed the rent, and where the rent is greater than the yearly value of the profits; for even there, as elſewhere is ſhewed, the executor, if he have aſſets, is tied to the holding of the leaſe, and paiment of the rent, and conſequently doth ſo much of that rent as exceeds the yearly profit, ſtand in equal degree the teſtators debt, with other debts by ſpecialty; and yet again to re-conſider this point, what if the debts of the teſtatar by ſpecialty payable preſently at his death, or before the time that any rent can grow due upon this Leaſe, ſhall amount to the full value of the teſtators goods; may not then the executor, though he do not pay thoſe debts before the rent day (for that would make the caſe cleer) waive the terme; for if he may, then haply if he do not ſo, but ſhall by paiment of any of this rent want goods to pay any part of the debts by ſpecialty, it may lie upon himſelf, and his own goods, as hapning by his own default. But on the one ſide, it may be ſaid that he could not waive it ſo long as he had aſſets, becauſe thereby he ſhould equally liable to pay that debt, be-

ing once due, as the other debts by ſpe-
alty. On the other ſide it may be ſai
that though the debts for rent, and up
bond, ſhall be admitted to be in natu
equal; yet the caſe being put of rent n
due at the time of the teſtators death,
was not then a debt nor duty, whereas
bond makes a preſent debt and du
though not preſently payable, the day
payment being not yet come, ſo as this l
ter is diſcharged by a releaſe of debts,
duties, and ſo is not the former. So to lea
that point unreſolved, let us next ſee wh
ther in ſome caſe, though the rent exce
not the yearly value of the Land, yet ev
that payable after the death of the Te
ſtator may not ſtand in moſt part, if n
wholly upon the Teſtators ſcore as
debt, as wel as if it had been payable b
fore his death. *Poſito* then, that the whol
or half years rent is payable at the A
nunciation of our *Lady*, and that the te
ſtator dieth two or three daies, or ſo
like ſhort time before that feaſt, now ce
tainly ſhould the Law be unreaſonable
it ſhould lay this debt upon the execut
ſhoulders in reſpect of thoſe few win
dayes profits which he took. But ſur
ſince the taking of the profits indu

the Law to lay the rent upon the Executor as his own debt; therefore as where the executor had the profits for the whole year or half year, except some few daies incurred in the testators life time, those few daies will be unregarded according to the rule, *De minimis non curat lex*, and the whole rent shall lie upon the executor as his own debt. So on the contrary part, where the whole year or half years profit except some few dayes incurred after the Testators death, the rent becoming payable so instantly after the testators death, must in reason lie wholly upon the testators estate, as to me it seemes. What if to this I adde that the testators cattel wherwith the ground was stocked, doe depasture and devoure the profits all the time after the testators death, till the day of payment of the rents? Nay, if the rent were payable at *Mich.* and the Annunc. and the Testator dies a few daies after *Mich.* the rent being of, or neer the value of the land, it wil then be hard that the executor shall for this Winter profit pay the rent out of his own purse, especially if the whole years rent be payable at that one day, as in some cases it is; or if the whole years profits were taken in

the Summer, as in case of a lease of tithe, it is so also of meadow grounds usually drowned in the Winter. So if the lease be then to end, not having a Summer halfe year to succeed, and make amends for the Winter: or if the Winter halfe year be the latter halfe, the lease beginning at *Lady* day, so that there is but a Summer for each Winter following, and not any for the Winter passed. Of like consideration with these, is the case of a lease of woods for a rent, which being fellable but once in eight or nine years; now if the Lessee having made the last sale and felling before his death, the Law should cast the rent upon the executors own estate for the time future, it should lay losse upon him, which is against reason, and contrary to the nature and disposition in the Law, even in this particular. As appears by this, that shee enables an executor to pay himself before any debt of equal nature, so as shee more tenders an executors indempnity, than any other creditors; therefore I think that with, & upon the differences above shewed, even rent growndue after the testators death, may in some cases be the testators debt paiable equally with debts by bond.

But

but here I conceive that if the Executor were in such case of destitution of assets, as might justifie his waiving of a lease over-rented, hee then may waive the terms residue, because for the future the profits will come short of answering the rent, though at the first, and so in the total, the profits did exceed the rent. And if for want of waiving where hee might, this rent fall upon him, the paiment thereof would be no excuse against another Creditor, nor as to him be a good administration, for *Ignorantia juris non excusat*. This is pertinent to our present consideration, which debt may with safety be paid, leaving another unpaid; and the hazard of executors by ignorance of the Law hath been a principal motive to my writing these discourses in English. Hitherto we have only considered, as I think, of rents, as they be recoverable by action of debt. Now let us see if there may not be somewhat different considerations touching distraining for rent, and so coming to recover it by avowry. Put we then the case that an executor hath fully administred in payment of debts by bond, and after the lessor or reversioner cometh and distraineth for arrerages of

rent due in the Teſtators life; can the executor in barre of the avowry plead fully adminiſtred, as he might have done, if an action of debt had been brought for the arrerages? doubtleſſe I think no, nothing ſhall hinder the levying of the rent upon the land, ſo long as it is enjoyed under the title of the leaſe, except the Land come to the King, upon whoſe poſſeſſion no diſtreſſe can be taken: I thinke therefore that the executor, who paid out of his own purſe to the value of this leaſe (for ſo I intend the caſe, and elſe could he not have fully adminiſtred, as in the caſe was put) he ſhould, I ſay, have abated in the price and valuation of the Leaſe, as well the arrerages of rent, as the rent futurely paiable, both being equally leviable upon the land; and if he ſo have done, he is no loſer by paiment of this arrearage: but if truſting to the power of an Executor, and to the plea of fully adminiſtred, he did not ſo, but diſburſed in reſpect of the leaſe to the full value, without ſuch abatement, he muſt bear the loſſe of his own ignorance. He might alſo another way have helped himſelf, *viz.* by payment of that arrerage, leaving other debts by ſpecialty unpaid. And what if ſuits were

preſently

presently commenced upon the testators death, before he could make payment of the rent behind, whether might the executor then plead this debt for rent, as he might a debt by judgment or statute? and surely me thinks it probable that he might, because it is a debt from which he cannot be freed by payment of the other debts sued for by specialty. If the reversioner would also commence suit before judgment had for the creditor by specialty, then might the Executor helpe himselfe by confessing his action first; but this perhaps the reversioner would not conceive safe for him, since that way the others might get judgment before him, and so he might lose both his suite and his debt; whereas holding himself to the course of distress, the lease continuing, he hath land at the stake for his debt. What if he distrain and avow? may not now the executor pay him, or at least confesse his action or avowry, so as he first having judgment, may first be satisfied? Surely after suit commenced, I see not how the creditors by bond can so be prevented, at least without judgment had for the rent; yea, though such a judgment be had, yet because the judgment in that case is not that hee shall recover the

the ſumme due for rent, but onely that he ſhall have a returne to the pound of the cattel diſtrained for the rent, it is queſtionable whether the payment thereupon of the rent ſhall prevent the judgments after had in the ſuits upon bonds. But I think it ſhall, becauſe although it be not an expreſſe recovery of the rent, yet it is ſuch a judgement compulſary for the ſame, as makes the payment inevitable and of neceſſity. And where before we have made the queſtion only betweene the ſaid rent-debt, and the debt by obligation: let us now put the caſe between the rent-debt and the debt by ſtatute or judgement. If then the Leſſor after death of the Leſſee diſtraine for the rent behind, part of the Teſtators cattel, and after there come a writ of execution upon a judgement or ſtatute of the Teſtators; whether ſhall theſe beaſts in the pound for rent be delivered in execution or not, admitting that without them there be not goods ſufficient for ſatisfaction of the judgement or ſtatute? And ſurely I think they cannot be delivered in execution: Firſt, for that they are in the cuſtody of the Law, as in *String-fellowes* caſe, though there the Kings prerogative

See 13. R. 2 Bro. Pledges 31 Attainder of the party diſtraind ſhal not take away the diſtreſs. *Vi. Dy.*

negative overtopped that point; yea, so I thinke, though they be replevied, for that they are to be returned to the pound, if judgement paſſe for the avowant, to which purpoſe ſecurity is given, ſo as they are but in the caſe of a priſoner bailed, who ſtill is in ſome ſort in cuſtodie. Secondly, for that this rent incident to, and deſcendable with the reverſion, breeds a debt of a real nature, and ſo of more dignity and worth then debts perſonal. Thirdly, for that the Land let (as in a ſort debtor) ſtands chargeable with this diſtreſs from the very time of making the Leaſe, as either by a contract real of *quid pro quo*, or rather by an operation of Law or Legal conſtitution, or ancient cuſtome of the Realme, without any contract of perſons. Laſtly, for that the Leſſor doth not diſtraine the cattel therefore, or in that reſpect, for that they are or were the goods of the Teſtator, but for that he found them levant and couchant upon the Land which muſt afford his rent, or a diſtreſſe for it if behind; ſo as if they had beene any under tenants or ſtranges Cattel, they might have beene diſtrained. Some may perhaps object this

this reaſon why theſe impounded cattel ſhould be delivered in execution, *viz.* for that where otherwiſe the creditor by ſtatute or judgement ſhould loſe all or part of his debt, yet by this relief done to him ſhall not the Leſſor loſe his rent, for that he may at any time after diſtraine any goods or cattel found upon the ground at any time during the continuance of the Leaſe. But here, beſides the point of delay and ſtay for this rent, which to many is the ſole meanes of maintaining their houſholds and families; this further is conſiderable, that perhaps the leaſe may be neare expiring, perhaps ſo highly racked and rented, even to or above the value, as that the Executor having his Teſtators ſtock taken from it and him by execution, will not ſtock it any more, and ſo the land lying freſh, if the Leſſor ſhal loſe the benefit of his former diſtreſs, he ſhall be perhaps without remedy for his arrerages of rent. And if the caſe were of a diſtreſs for rent behind after the Teſtators death, I conceive though not ſo ſtrongly, for moſt of the reaſons aboveſaid, that the Law would be all one as in the other caſe; for though in this caſe reſpect ſhall not be had to the Executors

loſſe

losse upon whose goods the Law casts this debt, though not the other, yet here the point of losse must fall either upon the Lessor losing his distresse, or upon the other creditor by specialty or record losing wholly or in part his debt. And in respect of this local tye upon this Land for payment of the rent, whereto even the fealty of the Lessee and tenure of the land bindeth him, I thinke no act that the Lessee can doe by entring into bonds or statutes, or having judgement against him can hinder the lessor or reversioner from taking his remedy upon this leased land for the rent therfore due, but rather any other creditor shall be a loser in his debt. Doubtlesse if in barre to the avowry for this rent due either before or since the Testators death, the Executor will plead that the Testator was indebted 1000. *li.* by statute, recognizance, or judgement, which is more then all his goods amounted unto, it will be no good plea, but may be demurred upon. What if he pleade so much debt of record to the Crowne? surely I doubt whether this plea will be allowed in any other Court then in the Exchequer; yet if these arrerages of rent shall be levied upon the

Vid. Brō. Pledg. 31.

the Land, ſo as either the Executor muſt pay it, or loſe the cattel diſtrained by a returne irrepleviſable, and then ſhall not have ſufficient to ſatisfie the debt to the Crowne. I ſee not how he ſhall well eſcape, when purſued in the Exchequer to make up this Crowne debt out of his owne purſe, which is hard. For this we may pitch upon as a *Maxime* and principle, that an Executor, where no default is in him, ſhall not be bound to pay more for his Teſtator then his goods amount unto. Againe, it is a rule, that where nothing is to be had, *viz.* juſtly to be had, the King loſeth his right, and our books tell us, the Kings Prerogative muſt not doe wrong, *Poteſtas ejus juris eſt, non injuriæ: nam poteſtas injuriæ non eſt Dei, ſed diaboli.* On the other ſide it may be ſaid, that if Land Leaſed come to the King by grant, outlawry, or otherwiſe, the rent reſerved cannot be diſtrained for, and therefore it is not very unreaſonable nor incongruent that the Kings intereſt for his debt ſhould make the diſtreſs of a ſubject ſtand by and give place. This therefore among other of the premiſes doe I leave as a *quære*: nor is it altogether unprofitable

So Bracton.

ſcable either for an Executor or creditor to know what wayes and paſſages, what caſes and contingents be doubtful and hazardous. And if in theſe unbeaten paths where our bookes and relations have held me forth no light, expreſſe, or particular, I have erred in miſ-reſolving, or miſſing to reſolve, I hope I ſhall without difficulty obtain pardon. Not reſolving.

Now let us conſider of aſſumptions or promiſes made by the Teſtator upon good conſideration; the performance whereof or making recompence and ſatisfaction for not performing, doth lye upon an Executor as before is ſhewed. Theſe therefore are to come behind, and give place unto all the former, ſo as an Executor this way or for theſe ſued, may plead debts by ſpecialty, rent, &c. amounting to the whole goods. And yet theſe debts by contract or aſſumption expreſs are to be ſatisfied before Legacies be to be had. Firſt, becauſe by the common Law of the Land thoſe are recoverable, and ſo are not Legacies: next becauſe, as our bookes ſpeake, it concernes the ſoul of the Teſtator to have *as alienum*, all duties and debts to other men ſatisfied before the debtors voluntary gifts or bequeſts Co. lib. 9. fa. 88. b. Doct. & Stu. lib. 2 cap. 10 & 11.

queſts. Alſo theſe debts by aſſumption or ſimple contract, are to be ſatisfied before the reaſonable part of the wife or children, to which by cuſtome in ſome Counties they are intitled, ſee 21. *Ed.* 4. 21. & 2. *Ed.* 4. 13. & 2 *Hen.* 6. 16. And note that in ſuch an action upon the caſe it is not of neceſſity to lay or ſet forth in the declaration that the defendant hath Aſſets to pay all debts by ſpecialty, and this alſo; but if there want, the defendant muſt alledg that in his excuſe, for elſe it ſhall be preſumed that he hath aſſets. So alſo in an action upon a caſe grounded upon the Executors own aſſumption to pay his Teſtators debt: and yet as the Ld. *Cooke* conceives, and upon good reaſon as to me it ſeemes, if the Executors ſo promiſing had not aſſets ſufficient in his hands to pay this debt promiſed, he pleading *non aſſumpſit*, may give that in evidence, for then the conſideration faileth, as alſo if there were no ſuch debt due, ſince the plaintiff could not have recovered if he had ſued, and ſo his forbearance to ſue was no valuable conſideration.

Co. l. 9. fo. 88. b. Pincons caſe and fo. 94 Banes caſe.

CHAP.

CHAP. XIII.

Of Devastation or Wasting.

THat which St. *Paul* of dispensers spiritual, who are as it were the executors of the last will and testament of our Saviour Christ, doth say or enjoyne, viz. that they must be found faithfull: The same is required of these lesse, or inferiour dispensers, the executors of mens Wils: and hereof they are to be regardful, not only in respect of escaping damage to their own estates, but more especially in respect of an oath which divers of our books mention to be taken by executors. And in one of the books of reports of cases in the twentieth year of *H. 7.* his time, there is an expression of three things whereto the Office of an executor tieth him. 1. To do truly, and thereto are they sworne, saith this book; 2. To be diligent, *viz.* with sedulity to attend the discharge of the trust. 3. To doe lawfully; nor well can this latter be without knowledg what is lawfull

or required by the law. Now what formerly said of the right method and order of payment of debts, discovereth in much part how, and by what ways an executor may waste and misspend his testators goods, and consequently incur a devastation, and so make his own goods liable. But of that more fully and particularly by it self, and herein we will consider of these parts.

1. What shall be said to be a wasting or devasting, and how many waies that may be done.

2. Who shall by this act be charged to yeeld recompence.

3. Who shall take the benefit or advantage of it.

4. How farre or in what measure the advantage shall be taken.

5. What way, or by what means it shall be had.

As to the first, this wasting is done divers wayes. 1. By the Executor his plain, palpable, and direct giving, selling, spending, or consuming the Testators goods after his own will, leaving debts unpaid. 2. By paying what is not to be paid, which yet is to be understood where there are debts payable and unpaid.

3. By the way formerly discoured of, *viz.* the not observing the right method and order of payment. 4. By assenting to a legatees having a thing bequeathed, debts being unpaid. 5. By selling goods of the Testators at an undervalue, for (be the appraisement what it will, and let him sel for what he wil) he must stand charged to the best and utmost value towards the creditors. Yet if upon a judgment against the testator or the executor, the Sheriff sel some of the testators goods at an under value, this is no vexation of the executor, for this difference *Hedy* chief Baron makes. But since an executor may haply prevent this act of the Sheriff by paying the due sum upon sale of the testators goods at the best value or otherwise, he is to be blamed to leave it to the conscience of the Sheriffe or Under-sheriffe rather. 6. And lastly, this may be done to the executors smart by undue, *viz.* not legal discharging of any debt or duty pertaining to the testator, and that divers wayes requiring heedfulnesse. As if an executor upon a bond of two hundred pounds forfeited for payment of 100 l. accept the principall, or perhaps also some use, costs, or damage,

or required by the law. Now what formerly ſaid of the right method and order of payment of debts, diſcovered in much part how, and by what ways an executor may waſte and miſpend his teſtators goods, and conſequently incur a devaſtation, and ſo make his own goods liable. But of that more fully and particularly by it ſelf, and herein we will conſider of theſe parts.

1. What ſhall be ſaid to be a waſting or devaſting, and how many waies that may be done.

2. Who ſhall by this act be charged to yeeld recompence.

3. Who ſhall take the benefit or advantage of it.

4. How farre or in what meaſure the advantage ſhall be taken.

5. What way, or by what means it ſhall be had.

As to the firſt, this waſting is done divers wayes. 1. By the Executor his plain, palpable, and direct giving, ſelling, ſpending, or conſuming the Teſtators goods after his own will, leaving debts unpaid. 2. By paying what is not to be paid, which yet is to be underſtood where there are debts payable and unpaid.

3. By the way formerly discoursed of, *viz.* the not observing the right method and order of payment. 4. By assenting to a legatees having a thing bequeathed, debts being unpaid. 5. By selling goods of the Testators at an undervalue, for (be the appraisement what it will, and let him sel for what he wil) he must stand charged to the best and utmost value towards the creditors. Yet if upon a judgment against the testator or the executor, the Sheriff sel some of the testators goods at an under value, this is no vastation of the executor, for this difference *Hody* chief Baron makes. But since an executor may haply prevent this act of the Sheriff by paying the due sum upon sale of the testators goods at the best value or otherwise, he is to be blamed to leave it to the conscience of the Sheriffe or Under-sheriffe rather. 6. And lastly, this may be done to the executors smart by undue, *viz.* not legal discharging of any debt or duty pertaining to the testator, and that divers wayes requiring heedfulnesse. As if an executor upon a bond of two hundred pounds forfeited for payment of 100 l. accept the principall, or perhaps also some use, costs, or damage,

and give a releafe or acquittal of the whole forfeited bond, or of all actions, or upon Record acknowledg fatisfaction upon judgment had. This is a waſting of ſo much as the penal ſum is more then is received, and ſo far his own goods ſtand liable to creditors not ſatisfied; and ſo doubtleſſe is it if he do but give up the bond having no judgment upon it, though hee neither make releaſe nor acknowledge ſatisfaction. But his verball agreement to require or ſue for no more, or his giving a note of receipt for ſo much as he hath received, or delivering of the bond into a friends hands, or into a Court of equity in way of ſecurity to the debtor that he ſhall not be ſued for more, is no devaſtation, ſince ſtil the reſt in law remaines due and ſuable. So this ſets no more upon the executors ſcore then he received. But let him take heed of releaſing, except he be ſure there be no other debts demandable. Nor only is there danger in releaſing of debts, but of treſpaſſes or other cauſes of action alſo. As if one take away goods from the Teſtator, or from his executor; If the executor make him a releaſe, this is a devaſtation, and makes his own goods liable to the

13 E 3. Fitz. 91

Yet on the other ſide, if an executor by payment of a 110 pounds, get in a forfeited bond of 200 l. it ſhall be an adminiſtrat. but of 110 pounds, 27 H 8. 6. p. Fitz. inſt.

the whole value of the goods releaſed, as appears by *Ruſſels* caſe, where the releaſe of an infant executor to one who had taken and committed to his uſe Jewels and goods of the teſtator, being pleaded, the releaſe was therefore held void in reſpect of nonage, for that if it ſhould have ſtood good, it had amounted to a *Devaſtavit*, and made the executors own goods liable; which, his infancy conſidered, had been hard. Another way of diſcharging, dangerous to Executors, is ſubmitting matters of debt or duty, or touching goods taken away, to arbitrement. For if by the award of the arbitrators the debtors or wrong doers be diſcharged or acquitted without making full recompence, the reſt of the value will (as to other creditors) ſit upon the executors skirts, becauſe it was their voluntary act thus to ſubmit it to arbitrators. Thus may executors fall under prejudice, not only by wilful waſting, or unfaithful miſcarriage, (wherein they are not to be pitied) but through incogitancy and unskilfulneſſe alſo. Nay, I may ſay truly, that it is very hard for executors in ſome caſes to walk ſafely: for beſides that to find out all judgments & recognizances by or againſt

their Teſtators, is of ſome difficulty more then for ſtatutes, whereof by ſearch in an Office deſcry may be had; yet with this difference, that ſtatutes Merchant, and ſtatutes ſtaple may be and ſtand effectual againſt executors, though not inrolled, albeit againſt purchaſers of the conuſors land they be not of force, if neglect be of inrollment within three months. But where ſtatutes or recognizances lie for performance of covenants upon ſale or leaſe of lands, marriage, agreements, or otherwiſe; how hard is it for Executors to know whether any covenant be broken or not; how hard to be ſure they find out all bonds, bils, covenants, and articles in writing made and kept by others, whereby any mony is due and payable before debts by contract or legacies, as alſo all promiſes or debts by contract payable before legacies? For the law hath preſcribed no time for their claime and demand, and whether ſome ſuch thing or mean of publication were not fit to be enacted, let the judicious conſider. To attaine to this knowledg of the teſtators debts, I remember that it is by the Lord *Brook* roported, that in King *Hen.* the 8. his time, Sir *Edmund Knightly* being exe-

cutor

nor to Sir *William Spencer*, made proclamation in certain Market Towns, that the creditors should come by a certain day, and claim and prove their debts, but he for this was committed to the Fleet and fined. For that none may make proclamation saith the Book, without warrant or authority from the King, except Majors and such like Governours of Towns, who by priviledg or custome may so do. But the dangers are only where there is not sufficient of the Testators goods and chattels to satisfie both debts and legacies. For where there is so, the executor is not in any such hazard as aforesaid. This descry of danger may breed caution, and *Qui timent cavent, & vitant.*

As to the second, we shall have in consideration two sorts of persons, *videlicet.* 1. His executors, there being many times divers executors, and the waste or devastation done but by one. Next the Executors own heirs, executors and administrators, *viz.* whether he dying, this act shall fix upon them like charge and burden for satisfaction, as upon himself should have lien in case he had lived.

Touching his companions, though all

Lib. Intra. fol. 327 Kelw. rep. fol. 23 So 11 H 6. 38.a. 4 El. Dy. 210 a the Writ so issued against the waster only P 4. H 8. rot. 203. Tr. 34 Eliz. Pas. 36 Eliz.

together make but one Executor, the mis-doing of one shal not charge the rest, nor make their goods liable to recompence: as both appears by the Book of entries, and was also held in the time of *Henry* the seventh, Anno 12 of his Reign. Yea of the same opinion were the Judges twice in the late Queens time, *viz.* first in a case betweene *Walter* and *Sutton*, in the common Pleas, and shortly after in the Kings Bench in a case between *Hankeford* and *Metford*; though these two cases be not reported in Print. And surely this stands with rules of Reason or Justice, that each should bear his own burden: If it were otherwise, many would decline, and abandon executorships as very dangerous to the most honest and faithful, in case they were subject to wracking by the miscarriage of their Colleagues.

As for the Executors or Administrators of the waster executor dying before he have borne the burden of this mis-doing, I have found contrary opinions even in the late Queens time. For first, in the *Exchequer* it was conceived to be as a trespass dying with the person, as coming within the Rule; *Actio personalis moritur*

persona. But in the said case of *Walter and Sutton*, the court of Common pleas was of contrary opinion, *viz.* that this was not escaped by the death of this misdoer, but the law would pursue his executors or administrators, and lay upon their backs the burden of recompence or satisfaction; for that the testator or intestate doing this wrong had made himself to be debtor in the first testators stead, and therefore they who represent his person must with his goods make amends and supply; and this later opinion was something in time after the former. Also between these two times was there an opinion in the said Court of common pleas agreeing in part with this later: For there a judgment being had against an Executor, and the Sheriff upon the *Fieri fac.* returning that there were no goods of the Testator in the Executors hands, and then this executor dying, A *Scire facias* upon a suggestion of devastation by the said Executor deceased, was awarded against his Executor, and that upon good debate, and shew of a President left, and reported by M. *Fanour*, in King *Hen.* 8. his time. And it was then said to have beene cleare, that if a devastation

Mich. 31 & 32 Eliz. Tr. 34. Eliz.

Tr. 34. Eliz.

Mich. 32 & 33 Eliz.

one had been returned in the lifetime of the ſaid waſtful Executor, his Executor then ſhould have been charged. All the doubt was, for that here that was not done in his life time; yet at laſt affirmatively (as above is ſhewed) the reſolution was.

Touching the third point, *viz.* to whom the advantage of waſting ſhall accrue, or who by reaſon thereof ſhall charge this waſting Executor. Put we the caſe, the Teſtator ſtood indebted to *A* by Statute, and to *B*. *C* and *D*, by ſpecialty, not of record, as Bond, Bill, &c. and the Executor having no more in aſſets then only an hundred pound, and this all being due to *D*, he payeth him the whole hundred pound, not having any thing left to ſatisfie any of the reſt of the Creditors: hereby wrong is done to none but *A*, who was a Creditor by Statute, and therefore he onely ſhall make this Executor to pay the like ſumme out of his owne goods; ſince as to him onely this is a devaſtation, or that it was at his election to pay off the other Creditors, which he would, no ſuite being commenced by any of them; conſequently no wrong was done to *B*, nor *C*. And if no

ſuch

debt had beene by Statute, but all ...been Creditors by ſpecialty, and *A* ...ly had commenced ſuit, and that ...wn to the Executor; now if after, he ...ed all to *D*, he ſtands only as to *A* li... in his owne goods, and not to *B* nor ... But if the Executor had onely paid a ...gacy or debt by contract, leaving no...ing for ſatisfaction of the debts by ſpe...alty, then had he ſtood equally lyable to each of the other Creditors, *Capiat qui ...cipere poteſt*, viz. he who firſt could recover, or by the voluntary act of the Executor, could obtaine payment, muſt be preferred, if the ſumme would reach no further. For it ſhall by this miſpayment, or miſconverſion ſtand with the Executor, as if he had not payed it nor departed from it at all upon the matter, and therefore I doubt not but it is free for him to give the advantage of this his error, to which creditor by ſpecialty he will ſo as he ſhall ſtand free from all the reſt, no ſurpluſage remaining, nor any creditor of record being. For if there be any debt upon record, the Executor ſued by a Creditor upon bond, may notwithſtanding this his waſting, plead in Bar of this ſuit, that there is ſuch a record of a debt not ſatisfied

If upon fully adminiſtred pleaded to one, *vel aliter*, he have the advantage of this waſtation, taking up the whole ſumme waſted, *quo.* how the Executor ſhall relieve himſelfe againſt another.

tisfied, and that he hath no more ... that debt amounts unto, and so ... so much still in his hands as he hath ... administred, though in kinde it be not ... his hands, but mispent, or unduly pay ... as aforesaid. And what is before spe... of the Statutes precedency before Bon... in taking the advantage against an Ex... cutor for devasting or wasting; the s... is to be understood of precedency ... judgements before Statutes, and debts ... the King before judgements, &c.

As touching the fourth point, *viz.* how far the Executor thus wasting shall incur damage or make his owne goods liable: Doubtlesse no further then the value of the Testators goods wasted or mis-administred. Therefore if one have advantage thereof to the full summe, no other after shall, for he is no further a trespasser or wrong doer, nor is the Testators estate any further, or deeplyer damnified. And as damages for trespasse are to be proportioned to the value of the wrong done, and losse sustained: So also in this case the Executor by his misdoing, doth not draw upon himselfe his Testators whole debts, but so much only as the goods amounted to, which he did mis-

administer, and which should have
e to the payment of the Testators
, if he had not so misguided himselfe
the office of Executorship; which de-
t he must repaire or make good. And
proportion seemes to me proved, by
case in K. *Ed.* 3. where the value or
ntity is found, especially of the goods
administred wrongfully, though there by
wrongful person: and in *Suttons* case it
was expressely held, that each Executor
should answer for so much as he wasted. 41 E 3. 31

Now for the fifth and last point, *viz.* how, and in what manner relief shall be had upon this point of wasting, for him to whom it pertaines: First, this is to be observed, that in case where the verdict passeth directly against the plantiffe, no devastation can come in question, for that no judgment being for the plantiffe, no writ of execution can issue; and therefore if upon the issue of fully administred, it shall appeare that there hath been a devastation which causeth Assets to faile, then must the Jury finde that the defendant hath Assets, and not find a devastation, as was resolved in the Kings Bench in the late Queenes time between *Hanke-ford* and *Mesford*, for there the Jury finding Pas. 36. El. in 6. reg.

ing a devastation, *viz.* a surrender of a lease for yeares, left by the testator, was held void, and nugatory, and was not regarded by the Court, which said, they must come in by the Sheriffs returne, upon the *Fieri facias*. Thus assets be found in the executors hands, judgment is given for the plaintiffe to recover the debt, and to have it levied of these assets: nor is this finding of them by a Jury against truth, though they be wasted, and so not to be had in kind: for the executor hath them in right, since he hath not rightfully parted from them, according to the rule, *Pro possessore habetur qui dolo (or injuriâ) desiit possidere.* As in the case first put; this wasting cannot come in question for want of a judgment for the plaintiffe; so also where the judgment it selfe extendeth to the executors own goods by reason of some false plea, whereof we shall after consider: for since that the consequence and effect of a vastation is but to make the executors own proper goods liable to the debt of the creditor, this is altogether needlesse where the judgment it selfe hath laid hold on his goods. But now in case where the judgment extends onely to the Testators goods

goods in the Executors hands, let us find the way to relieve the creditor, in case the testators goods be wasted by mis-administring or otherwise; for hereabout the right way hath often been missed, and again easily may be. In the later end of the Q. time this course was taken, *viz.* the Sheriff returning generally that the Executor had no goods, a surmise was entred, that the executor had converted to his own use the testators goods, whereupon a Writ was awarded to the Sheriffe to enquire thereof by jury or enquest, which he did, and returned that it was found that the executor had wasted the goods; and thereupon a *Scire facias* was awarded against the Executor, to shew cause why execution should not be of his own goods, and upon two *Nihils* returned execution was so awarded; but a writ of error was hereupon brought. And although it were said for defence of that course, that it was usual in the Common Pleas, and more favourable then the other course, where the Sheriff onely returneth the wasting, or is sole Judge thereof, whereas here it was found by an inquest of Jurors, and thereupon a *Scire facias* awarded; yet did the Court

45 El. Executors case.

Co. lib. 5 fol. 32.

resolve

resolve the contrary, and reverse the execution as erroneous: For it was said that upon the Sheriffes returne of *Nuda bona*, *viz.* that there were no goods of the Testator to be found, the plaintiffe should have a special Writ of *Fieri facias*, willing the Sheriffe to levie the sum recovered, either of the goods of the Testator; or if it could appeare that the Executor had wasted the Testators, then to levie it of his owne goods; and this way, as was said, the Executor hath good remedy by action against the Sheriffe, if without just cause he levie it of his goods; but the other way, *viz.* When inquest is thereupon taken, the remedy failes, since neither Sheriffe doing according to the inquest, can be punished, nor the Jurors finding falsely are subject to any attaint, it being no verdict upon issue joyned, but an inquest of office, which excludeth also all challenge of Jurors. And whereas that booke mentions the Sheriffs subjection to action onely in case of his mis-feasance or doing wrong, I conceive that he is likewise suable for omission or nonfeasance in this case, *viz.* for not levying the debt upon the Executors owne goods where proof is made of

So 9. H. 6. f. 9

See Paston 11. H. 6. 16 36. upon surmise that *A* hath wasted, *A Fieri facias* may issue against his goods only. If so, &c. So. lib. Int. fol. 11.

of his wasting. And where the book mentions this *Fieri facias* to be in this manner upon the Sheriffs return in a *Sci-as facias*, doubtlesse the book therein is mis-printed, and should be a *Fieri facias*, for in a *Sci. fac.* the Sheriff can return nothing but that he hath warned the party, or that he hath nothing whereby he may be warned. This then is the course there prescribed, that first a general *Fieri fac.* goe out, and that thereupon the Sheriff return generally that the defendant hath no goods of the Testators, and that thereupon the said special writ is to issue; yet in the beginning of the late Queens time, the verdict passing for the plaintiff upon the issue of fully administred, the Sheriff was not permitted to make such a general returne of no goods to be found of the testators, but was inforced by the Court upon good advisement, either to levie the debt, or to returne a *Devastavit*; and so was done at last by the Sheriffs of *London* much against their minds; and thereupon went out a writ to levie the debt of the executors own goods, first in *London*, and after into *Devonshire*, upon a *Testatum* that the Executor had goods there: and it was there said that

2 El. D. 185 *Woodw.* and Chichesters case.

if no goods could be there found, then the Plaintiff might have a *Capias* to take the Executors body in Execution, or an *Elegit* for the moiety of his lands. But certainly I cannot finde (except with a difference) how this course of forcing the Sheriff to do one of these two can be just; as neither could Justice *Fulthorp*, in the time of K. *Hen.* the sixth, approve it. For a Jury of one County may find assets in another County, as was resolved in the time of K. *Hen.* the eight, which yet was understood of goods moveable, and not of lands. This then thus being, if a Jury of Kent find assets which be in *London* or *Essex*, how can the Sheriff of *Kent*, where the action was laid, levie the debt recovered by or out of these goods; or since hee cannot, why should he be compelled to make a false returne of a wasting, when the goods remaine unspent and unwasted in another County? Why rather should he not be suffered to return according to truth, that there is nothing within his County or Bayliwick whereof the debt may be levied, since even his oath tieth him to make a true return? Nor is this contrary to the verdict, finding assets generally

11 *H.* 6. f. 28
28 H 8 Dy.
3 Yea Co. lib. 6. f. 47.
46 Assets in Ireland, or elsewhere beyond the sea may be found by the Jury where the action is laid.

For the pl. may if he will suggest the being of assets in a forraigne County, and this is usually done. See lib. Intr. 11 a. Action upon the case for a false return of Devastat. contra sacr. sui debitum 28 H 8.

and

and this so returned upon a *Testatum*, the processe may be directed into the right County. But in the said case it was replied to the plea of fully administred, that there were assets in *Essex*, the action being laid in *Middlesex*, and yet as it seemes by the book, the trial was to be by a Jury of *Middlesex*, which, saith the book, may find the assets in *Essex*; but there the plea was demurred upon, and held a good plea, which proves that although the transitorinesse of the assets make them subject to the notice of a forraign Jury, yet is it not like an act transitory, and not local, for that must be pleaded to bee done in the place where the action is laid, though in truth not so. But had issue been joyned upon the point, me thinkes it should be tried in *Essex*, where the assets be laid; the rather, for that perhaps they may be real chattels, *viz.* lands leased to the Testator, or other lands of him appointed to be sold for payment of debts, which as heretofore hath been held a Jury of another County cannot find. Besides, Although such a forreign Jury may find other movable assets, yet is it at their election, they are not thereto compellable, as elsewhere is holden. Here then

2 Ma. Bro. Assize 104. and 10 El. Dyer 271. Because local & fixed, otherwise held, 3 Jac. in com. b. Co. lib. 6. f. 46, 47. 22 E. 4. 9 a. 2 Ma. Bro. Act. 104. 18 H. 7. Kelw. rep. 51 a. So held p. 21 El. in Scacar.

may be the difference, *viz.* that if the assets be found to be in the County where the trial is, there the Sheriff of that County cannot returne *Nulla bona*, without adding that the executor hath wasted: but if there be no verdict at all touching assets, judgment passing against the executor upon a demurrer, confession, *Nihil dicit*, or the like; there may the Sheriffe make such a return of *Nulla bona Testatoris*, without returning any devastation; and so also where the verdict either findeth assets generally, not finding in what place they be, or expresly findeth them to be in another County, as a little before we found may be done by a Jury of *London*, of assets in *Essex*.

So if the proces for execution go into another County than where the verdict found, as the difference was held in Scac. 31 El. 28 H 8 Dy 30 b Pas. 4 H 8 ror. 303, 4 El. Dy. 210 But 2 H 6 12 without any Sci. fac. upon the devast. returned, a capias was awarded by the Court; and see 9 H 57 Bro. Ex. 57 & lib Intr. 322

In King *Hen.* the eighth his time, as a little after the said *Chichester*, is by the Lord *Dier* reported, the Sheriffe returning upon the *Fieri facias*, that the executors had no goods of the testators, did adde in the same returne that one of the two executors had wasted, and thereupon a *Sci. fac.* was awarded against him, & upon *Sci. feci.* returned, & default made, execution was adjudged, and awarded against his goods only, and this course of *Sci. fac.* both the L. *Dy.* (as elsewhere I find it reported) & *Pryor. temp. H. 6.* approved. But

A *Fieri fac.* absolutely and without condition.

I

I am perplexed with doubt what plea the Executor coming in upon the *Scire facias*, could plead; for except his denial of wasting might be pleaded contrary to the Sheriffes returne, and put in issue, so as to cause a new trial after a former, perhaps preceding jugement, which I think would not be admitted, then his coming in is to little purpose for ought I can conceive. Here againe it must be observed that in the case of *Chichester*, the judgement was had upon trial of fully administred; but in the other case in the time of King *Henry* the eight, it was upon confession, which is all one, as I take it, with condemnation upon *Demurrer*, or *non sum informatus*, or trial upon *Non est factum*, to the Bond, or a release to the Testator, or the like. Now between all these, & that of *Chichester* there is a broad difference, for there the defendant being convinced by verdict to have Assets, which if they continue not in his hands in kind, must be answered out of his own goods as wasted, therefore the *Fieri fac.* to levie the debt of the Testators goods, if any found, or in default thereof out of his own goods, is very agreeable, & pursuant; but in none of the other cases is there any such trial or conviction of the defen-

809 H 6. 40. 50. A manuscript report. 36 H 6. f. 3 & Mordon 12 H 7. Kelw. rep. 24. But Vavasor Just. & all the other. Serjeants è cont. 2. El. D. 185.

dants having assets, so as it rests *aquidubium*, whether they have assets or not, and therfore it may seem somewhat hard and harsh to send out such a writ in that case, and so should I have thought, if I had only seen the report of *Pettifers* case. But looking into the Record, and finding the condemnation there to be by *Nihil dicit*, in effect, I cannot uphold any distinction of course in respect of the said difference of cases. Nor indeede doth that course there directed presume that the executor either hath assets, or hath wasted them, but commands that if assets, &c. then the levying shall be one way; if wasting, then another way, so if neither *Nihil fiend*.

Co. lib. 5 fo. 31 Mic. 41 Eliz. rot. 1441 Co. lib. Intr. 269 b. A recovery of debt precedent was pleaded; Pl. replied *nul tiel record*, and def. would not maintain his plea. Ideo condemp. If neither, he must so returne and do nothing.

CHAP. XIIII.

Of an Executor of his own wrong.

TO begin with some definition, or description of this man; He is such as takes upon him the Office of an Executor by intrusion, not being so constituted by the Testator or deceased; nor for want

of such constitution substituted by the Ordinary to administer. Touching whom we will consider in these parts, and with this method, *viz.*

1. What acts or intermedlings of such as one not being executor nor administrator by right, shall make him to become an Executor by wrong. *vide* 5. more *per stat.* 43 *E. cap.* 8.

2. In what manner, and by what name such shall be sued, specially when another then he is executor or administrator, or himself after such act becomes administrator.

3. How far he becomes liable to creditors, and how, and to whom.

4. What acts done by him shal stand firm as if he had been an executor by right.

5. See a late stat. 43 *E. cap.* 8. hereabout.

As to the first, it was in the time of Queene *Mary* doubted, and not resolved whether the onely seising, and taking into ones hands the goods of the deceased did make one Executor of his own wrong without any further act. And in the beginning of the late Queenes time, the Lord *Dyer* said that the possession, & occupation of or medling with the goods is that which gives notice to Creditors,

1 And 1 P. & M. fol. Dy. 103 b.

1 El. Dy. 166 & 167 So also Balkn. 50 Ed. 3. 9

tors, whom they are to ſue as executors. But doubtleſſe creditors muſt look further before ſuit; for elſe can they not know whether he ſo intermedling be executor or adminiſtrator, nor conſequently how to found their ſuit rightly, and ſafely for good ſucceſſe, ſince a ſuit againſt an executor as adminiſtrator, or againſt an adminiſtrator as executor, will prove ruinous, and fall to the ground. Yet where an Adminiſtrator ſued as executor did not plead that adminiſtration was committed unto him, but generally denied that he was executor or adminiſtred as executor, the Lord *Dyer* held that it muſt be found for him, yet left it doubtfull: but the cleer and ſafe way had been to have pleaded the adminiſtration. &c.

13 & 14 El. Dy. 305, 306

And in the former caſe the Lord *Dyer* ſaid, that one intermedling onely about the funeral, and laying out money therefore; an overſeer or conductor, or he who hath Letters of the Ordinary *ad colligend. viz.* to get and keep the goods in ſafety, and one who intermedleth by vertue of a will truly made, but controlled by a latter will after found and proved, may free himſelf from being an executor of his own wrong by ſpecial plead-

1 El. D 166 & 167 ſee 11b. Intra. f. 322 b.

ceeding how or in what right he intermedled, and traverſing his adminiſtring in other manner; and that this traverſe need not, nay may not be, was held in the time of King *Henry* the 6th and 7th, for that ſuch acts amount not to any adminiſtring at all: and where no adminiſtring at all is confeſſed, ſuch a traverſe of not adminiſtring in other manner is diſſonant, and not legall. But let us look back upon theſe ſeveral points exempted by the Lord *Dyer*, and we ſhall ſee ſome cautions neceſſary touching them, and their ſafe entertainment. Firſt as touching the point of burying the dead, it muſt be underſtood to be with ſome expence of the deceaſeds goods, and ſo it is expreſſed in the ſaid book of *Hen.* the 6, his time: elſe for a man out of charity to lay out of his own mony (not imtermedling with the goods of the deceaſed) to bury a friend, hath little colour to involve him ſo doing in an Executorſhip by wrong; taking the caſe then that ſuch perſon laies out or expends of the deceaſeds goods or mony upon his funeral, heed muſt be taken touching the meaſure and proportion whereabout; though I can give no particular and diſtinct limit, yet doubtleſſe

12 H 6 28
10 H 7 18
Yet lib. Intra. 321 b where he confeſſed about funerall he traverſed aliter Lib. Intra. 322 where by letter ad collig. bles traverſed; Abin; hoc quod & exte.

21 H 6. 28

lesse either meere necessity, *viz.* Chu[illegible] duties, &c. or at least decent sutable-nesse to his quality must be the bounds. And herein to speake as I think, this latter must either be utterly excluded, or held within very narrow compasse; for what reason, that a Knight or man of higher quality leaving (though perhaps entailed Lands of good value) yet goods not sufficient to pay his debts, should have an hundred pounds or more of that which should satisfie Creditors, spent in pompous interring of him for his worship, and reputation? Next, overseers may onely be excused for seeking to preserve, and keepe the Testators goods, not in case they expend or dispose thereof. So also for him who is authorized by the Ordinary to Collect, for if he sell or dispose of any (though goods otherwise subject to perishing) it makes him an Executor by wrong, as was resolved in the late Queenes time, notwithstanding that by the Ordinaries Letters, he was expresly directed or warranted so to doe; for it was said, the Ordinary himselfe could not so doe. As for him who administred by vertue of a Will, after disproved or controlled by a Letter, He must

Lib. Int. 302 8 and 9 Eli. Dier. 255. 256. He sold blended Corn, but there he pleaded not the special matter.

not doubtleſſe ſtand free, for the
before adminiſtred, but either
ghtful or wrongful Executor ſtand
le to the Creditors. Nor doth every
intermedling by one out of all theſe
ſes, and evaſions, as would be an
miniſtration, make one an Executor
wrong. If one doe but take an horſe
the deceaſed, and tye him in his Houſe
Stable, this makes him not an Execu-
, ſaith *Paſton* a Juſtice; So of like
s or intermedlings, as he that delivers
the Wife of the deceaſed her apparel,
leaſt if it be no more then is convenient
her degree. But if ſhe take, or
nother deliver more then ſuch to her,
e or he becomes an Executor by
wrong: But now let us come to a dif-
rence, where there is a rightful Execu-
r, and a Will by him proved, or ad-
miniſtration committed, for there ſuch
ight acts or intermedlings ſhall not
make one an Executor by wrong, as
where there is no other of right to be ſu-
ed. As if one take goods wrongfully
from ſuch a right Executor or Admini-
ſtrator; this (though he convert them
to his owne uſe) makes him not an Exe-
cutor by wrong, but a Treſpaſſer to the
right-

1 and 2. P. & Ma. Dy. 105.

21 H 6. 28.

33 H 6. 31
1 Eliz. Dy. 166.
Tr. 37. Eliz. by Fenner Juſt. If one do any ſuch act as pulls the property out of the Executor, he is become an Executor by wrong.

If the goods be alienedby fraud, he who takes them after the Executors death is an Executor by wrong. Tr. 37. Eliz. L. 5. E. 4 72. a.

rightful Executor or Administrator, who ... for these goods, once Assets in his ha... stands lyable to suits or creditors, they ... ing neither lawfully evicted nor rig... administred: but in case there had b... no Executor at that time, or no Will p... ved nor administration committed, t... such taking of the deceased's goods i... a strange hand had made an executor... by wrong. And thus was the differe... lately resolved, as is reported by the L... *Cooke* in the case between *Read* and C... *ter* in the Common Pleas.

Tr. 2. Jac. in com. b. Co. lib. 5. 33 & 34.

Yet this further difference was the... held, *viz.* that although there be an Ex... cutor or administrator by right, yet if ... stranger take upon him to receive deb... and make acquitances, or to pay debt... claiming to be an Executor, he is suab... as an Executor by this act: and so al... 1. Eliz. D. 166. b.

in the late Q. time was held by 6. Just. ... touching the receipt of debts and maki... acquittances; but the booke mentions not whether any other Executor then wer... or not. But in the point of bare payment H 20. 7. 5. of debts *Frowick* makes another diffe... rence, *viz.* If a stranger doe with his own mony pay the debts of a friend deceas... ed, and not with the debtors: This s... bu...

an act of charity, and makes him not Executor by wrong: otherwise, if the debtors money. Yet to this another difference must be added, *viz.* that thus paying with his owne money, have taken into his owne hands goods of deceased; then is his payment presumed as by or out of the value of these goods, and so makes him an Executor by wrong. Contrarily, if he have no such goods in his hands. And in the point of intermedling with and disposing of the Testators goods where another Executor is, this further difference is to be added or understood, *viz.* That where the goods so taken never came actually to the Executors hands, but were in a remote place, there this taker becomes Executor. For as it were mischievous to the Executor if he should by a possession in law cast upon him stand chargeable with these goods in remote places purloyned as assets in his hands; so were it as mischievous to creditors, if neither Executor by right, nor this stranger as an Executor by wrong, should stand lyable to creditors for them. It is true that the right Executor may sue and recover damages for them, and that so recovered shall be Assets;

Aſſets; but the Creditor hath no m
at the Common Law to inforce hi
ſue, and perhaps it may be a cold
And with theſe additions I thinke
late reſolved difference may ſtand
and ſound. Yet in former times with
ſuch difference the taking only and p
ſeſſion of the goods of the deceaſed,
held to create an Executorſhip by wro
50 E.3.fo.9. as *Belknap* ſaid in the time of King E
the 3d. and eſpecially if the act were ſuch
as removed the property of the right Ex-
Tr.3.Eliz. ecutor, as Juſt. *Fenner* in the late Queens
time ſaid, *Teſte meipſo.*

*How, and by what name ſuit ſhall be a-
gainſt ſuch, and the like.*

2. *Point.* TOuching the ſecond point, *viz.* in
what manner ſuite ſhall be againſt
ſuch: Firſt in general, this uſurping Ex-
L.5.E.4.72 Co.lib.5.30. ecutor is not in ſuit to be diſtinguiſhed
31. & 32. b. 21 H 6. 8. by name from the right Executor, but
to be ſued generally by the name of Exe-
cutor of the laſt Will and Teſtament of
the defunct, and then if he will deny him-
ſelfe ſo to be, he muſt plead, that he
neither is Executor, nor hath adminiſ-
tred as Executor: Then the plaintiffe
muſt

shall prove that he hath administred in some such or the like sort as aforesaid. And it hath been divers times held, that where there is a right Executor, and yet another doth administer by wrong, it is at the election of Creditors either to sue them joyntly together, or one or both of them severally and by himselfe. But if where administration is committed, another also administers by wrong, these cannot be sued together as administrators; for though one may be an Executor by usurpation or wrong, yet none can come to be an administrator by wrong, since no other but such as receiveth that power from the Ordinary can so be; therefore in that case there is a necessity of suing him a part and by himselfe (who so usurpeth administration) by the name of an Executor. So if *A* administer the goods of *B*, not being Executor nor administrator, and after his such doing and disposing of the goods he obtaineth administration of the goods of *B*, but the goods left or coming to his hands since the administration committed, suffice not without the other debts received or released, or goods sold before to satisfie Creditors; now if

Co. li. Inst. 144. but 145 a. in the verdict, he is called Exe. *De injuria sua propria.* 39 H. 6. 45 46. 21. H. 6. 8 19. 9. E. 4. 14 15. 1. & 2. P. & M. Dy. 165. 33. El. 38

25. H. 6. 31.

if any sue *A* by the name of administrator, he shall have no further relieſe then according to the value or extent of the goods left in or come into his hands since the administration committed, and if those be fully administred, he shall get nothing. If they remaine unadministred, but amount not fully to his debt, he must want so much of satisfaction. And if he will be relieved or satisfied out of the goods before disposed of, he must sue *A* as Executor of *B*: and so was it ruled and resolved by *Gawdy* and *Suit*, Justices in the K. Bench in the late Queenes time, *viz. Tr. 30. Eliz.* And if this now administrator will plead in abatement of this action, that administration was committed to him, and demand judgement if suit shall be against him as Executor, then the plantiffe must in this replication, as I take it, set forth the special matter, *viz.* how the defendant did administer before administration to him committed. But if one to whom administration is committed do devast, and this administration is by suite repealed, because he was not the next of kinne, and administration is committed to another; now a creditor who would be relieved out of the

31 H. 6. 8. If the Administration were committed before the suit began, the writ shall abate, else not, as was of old conceived.

goods waſted, muſt ſue that firſt as Adminiſtrator, and not as Executor of his own wrong, ſaid *Popham* Chiefe Iuſtice; for he did rightfully adminiſter for that time. vid. 8.185

AS for the third, *viz.* how farre this executor of his own wrong, becomes liable and obnoxious to ſuit; conſider these things; 3. *Point.* How far liable to creditors.

Firſt, he becomes ſubject both to the action of the executor who hath right to the goods wrongfully intermedled withal by him, though it were before proving of the wil, and alſo to the action of the creditor who hath right to the ſatisfaction of his debt.

Secondly, as touching the meaſure how far he is ingaged, doubtleſſe he is not by his wrongful adminiſtring become chargable with the whole account of the Teſtators debts, but only ſo farre, and with ſo much thereof, as the goods which he ſo wrongfully adminiſtred amount unto, (Yet he muſt look to his plea, leſt by it he may draw all ſued for, upon himſelf, as if he deny his being executor or Adminiſtrator.) And this ſeemes to be proved by the caſe in the time of Edw. the third, where the inqueſt found Co. lib. Intr. 144, 145 Plus de hac.

not only the administring or inter-
ling by the executor wrongfully,
found also by direction of the Court
it seemeth) what the value was of
goods so wrongfully administred, wh
had not been materiall, if the adm
string of a penny had made one as
Chargeable as the administring o
pound. Besides, if it be so that a ri
full executor wasting goods of the te
tor to the value of twenty pounds, s
be no further charged than that valu
then doubtlesse so shall it be also in t
case, for both be wrongfull administr
tions: onely this difference there is b
tweene them, that in one case the adm
nistration is by a wrong person, and
the other case in a wrong manner. Na
1 El. Dy. 167 the Lord *Dyer* doth not stick to call him
cap. 12 who administreth wrongfully, or in und
manner, expresly an executor by wrong,
the case of *Stocks* against *Porter*, thou
he were rightfully executor, because
did dispose or execute wrongfully.

4. *Point.* what acts of his of force. As to the fourth, *viz.* what acts don
to him, or by him who is an exec
tor of his own wrong, shall stand firm
and good, as done by or to the right ex
cutor.

tor. Suppose, first, that the deceased were indebted to him 20 l. who thus accepteth executorship, whether may he pay himself or not? And this point was in debate in the Kings Bench between *Coulter* & one *Ireland*, executor of *Hunt*, where it was strongly objected, that notwithstanding the rightful executor or administrator might punish him, and recover against him for the goods which he administreth; yet another creditor suing him as executor generally, and so affirming him to be (for there is no speciall form of writ or declaration to distinguish an executor by wrong from a rightful executor) hee stands as against him in the state of a rightful executor, and therefore may first pay himself before he pay others; and of that mind at the first were *Fenner* & *Gandy*, Justices, yet did they admit that this payment should not stand good, as against the rightful executor or administrator. And *Popham* and *Clinche* held strongly that neither should it stand good against other creditors, for then every man would rush upon the testators goods and be his own carver in paiment: And whereas it was said at the bar, that the Lord *Anderson* upon an evidence at

M. 40. 41 E. Co. lib. 5. f. 30

Guild-Hal had ruled it otherwiſe, *Popham* at another day of debate of the ſaid caſe, related, that the L^d. *Anderſ.* did deny that he ever ſo ruled, or was of that opinion; & further informed that both he and Juſtice *Walmſey*, *Periam* and *Clark*, Barons, did agree with *Popham* and *Clinch* in opinion. After which, Juſtice *Gawdy*, as alſo *Fenner*, if I miſtake not, changing their opinions, and concurring with the reſt, judgement was given accordingly. In the debate of this caſe, queſtion was made if ſuch an executor by wrong pay a debt to another creditor by ſpecialty, whether this ſhall not ſtand firm and good, ſince he ſtands liable to creditors ſo far as the goods by him adminiſtred doe amount, and it was agreed by the better opinion at leaſt, that this ſhould ſtand firm and good, ſo as if the payment were out of his own goods, he might retain to himſelf in lieu thereof ſo much of the goods of the Teſtator; for here he doth not, as in the other caſe, advantage himſelf by his owne wrong. Yet that opinion allowing this paiment to creditors, muſt, as I think, be underſtood with this difference, *viz.* that this payment ſhall ſtand as againſt other creditors, but not as againſt the

right

ght Executor or Administrator, for then any stranger might usurpe the office of executor, and take from him that liberty and election to prefer which creditor he will in first payment; yea, might take from the executor power to pay himself before other, in case there were a debt due to him, which were very unreasonable.

Of addition and alteration by the statute 43 Eliz. cap. 8.

WEE having considered what the Common law is, and willeth in the premises, Let us now see what alteration or addition a late statute hath made. In the last Parliament of the late Qu. *Eliz.* consideration being had of subtil getting into mens hands goods of an intestate by deed of gift, or letter of atturny from one of small or no ability, to whom such subtile contriver hath procured administration to be committed, and so himself would stand free from the suit of Creditors, the Administrator himselfe either not being to be found, or not being of any value to satisfie creditors. It was therefore enacted that every person, receiving or having any goods or debts 5. *Point.*

of any intestate, or any releasé or
charge of any debt or duty belonging
him upon any fraud as aforesaid,
without consideration of or neere
value (except in satisfaction of so
just, and principal debt to the value
the goods or debts due from the
testate) shall be charged as Execu
of his own wrong so far as the value
those goods and debts amount; ded
cting all principall just debts to him du
and payments by him made, which
lawful executor ought to have p
Here have wee a touch of all the par
precedent, or at least three of them.

1. We have first a new executor b
wrong, though intermedling under th
title of an Administrator.

2. We have a limit of the charge b
him incurred sutable to our former ex
pression.

3. Lastly, we have to him an allowanc
of debts owing to himself or duely pai
to others, which is more then we hav
conceived allowable to another Exec
tor by wrong.

CHAP.

CHAP. XV.

Of pleas by Executors, and which be beſt, which moſt prejudicial to them.

SInce amidſt the Pleas pleaded by executors there is ſuch difference as that ſome induce one kind of judgment, ſome another, ſome drawing more loſſe and burden upon Executors then others: Let us conſider of the differences, ſo as light may be taken to chooſe the ſafeſt or fitteſt for each caſe.

If an executor do utterly eſtrange himſelf from the executorſhip; ſaying that he was never executor, nor ever adminiſtred as executor (for that muſt be added) then if the iſſue be taken upon the plea & it be found againſt him; the plaintiffs ſhal have judgment to recover not damages only, but even the debt it ſelf out of the proper goods of the executor, if none of the teſtators can be found to ſatisfie it. And this ſhal be thus not only where it is found that the defendant was made Executor by the wil, & proved it, and ſo could not chuſe but know it, but even alſo where

Plea; denying the Executorſhip 21 H 6. 19, 20 Bro. 62 2 E 4. f. 4 19 H 7. 15

Lib. Intr. 322, 333. 33 H 6. 33. 34

he had never proved the Will whereof he was made executor, nor ever administred by vertue thereof: yea though he did before the Ordinary refuse to be executor of this will, or to intermedle with the execution thereof; yet if any other named executor with him did prove the Will, or did not refuse to be executor let such other refuser take heed of pleading that plea. For truth is against the first part of his plea, *viz.* that he never was executor; and so the verdict which must be *veritatis dictum*, must needs passe against him, and make his own goods lyable as well to debt as damages. What if no other were made executor but this onely who refused before the Ordinary, may he safely plead that he never was executor? I thinke not, since he so was executor before his refusal, that he might have released all debts due to the testator, and given away all his goods, therefore I thinke he must plead specially, shewing his refusal, & not generally deny his being executor.

He was lyable as soon as the Testator was dead.

Nay admit he never was once named, made or intended to be made executor, yet having pleaded this plea, that he never was executor nor administred as executor, if it shall be found by verdict that he

he did administer or intermeddle as executor, the same blow or burthen falleth upon him, for then the latter part of this Plea is found untrue, yea the whole upon the matter, for by this administring he became an executor of his own wrong, and the denial of this executorship by wrong or usurpation shal be as penal to him as the denial of a rightful executorship. The like Law where the executor pleades a release made to himself, or a payment of the debt or other performance of the condition made by himself. Nay I find in this latter case the judgment entred generally against the defendant, as against another, for his own debt, not being executor. And the reason why the Law makes these so penal to an executor is, because his Plea is not only false, but the falshood thereof was wilfull, since it must of necessity be known to himself to be so. And lastly, for that all these Pleas, if they had proved true, had beene perpetuall barrs, at least against the defendant: the first indeed had not beene a barre against another being in truth executor or administrator. But if the executor had pleaded a release made to his testator, finding such a one among his writings

But if hee did it as Administra. it is otherwise; yet see that specially pleaded Co. lib. Intr. 148 a.

See Co. lib. Intrae. Judgment so entred. fol. 145 b Read and Carters case

Co. lib. Intr. 29. a. not first de bonis testatoris si, &c. See Bro. Ex. 22 these reasons for this diff.

33 H 6. 23 24

which yet was either forged, or never both sealed and delivered by the plaintiff as his deed; or if he plead paiment made by his Testator, neither of these Pleas found against him shall cause the judgment to fasten upon his own goods: so if he denied the Bond or Bil, whereupon the Suit is grounded, to be the testators deed. For in all these cases the truth being not knowne to him, he might honestly and reasonably conceive it to be as hee did plead. But what if hee plead fully administred, and this bee found against him, which rested in his owne knowledge? shall not this false Plea expose his owne goods in defect of his Testators to the satisfaction of this debt? no, it shal no, for that though this were a false plea, and that within his own knowledg, yet was it not a perpetual bar, for if it had been so found as was pleaded, yet assets coming after to the hand of the Executor, the plaintiffe should then have relief and satisfaction out of these since accrued assets. If any ask how assets may after come, I wil give him two or three instances. First, it may be by recovery of debts before withholden, or of damages for goods taken away,

So of other perform. Co. Lib. Intr. 133 a. 6 E 4. 1, 7 E 4. 8 See Bro. Ex. 22 that the Book contrarily reported 34 H 6. 22, 23 is erroneous, as was descried by Fitz. & al. 23 H 8 the Record being not so as the book saith the judgment was.

or

by voluntary payment of a debt not before due, for that the time of payment was not come. Secondly, if the Testator having a Leaſe for twenty yeares, did demiſe the ſame to *I S* for the whole terme, if he ſo long ſhould live, if he were alive in time of the former verdict, but now is dead, the terme continuing, this is now Aſſets which before was not, whilſt it was but a poſſibility of a terme. Other inſtances might be given, but theſe may ſuffice. If the Executor pleaded that the Teſtator ſtood bound in ſuch a ſtatute, or that there was ſuch a judgment againſt him of debt to the King beyond the ſatisfaction whereof the goods would not reach: This is in effect a fully admitted though ſpecial, and not generall, and the Law is alike (as I take it) in all theſe caſes as to the not making of the Executors goods lyable. But in all theſe caſes though the debt ſhal not be adjudged upon the Executors owne goods, yet the damages ſhall, in default of the Executors goods to ſatisfie them. And in theſe caſes it is not material whether the judgment paſſed upon trial or demurrer. Nay if the defendant Executor plead no plea, but confeſſe the action generally, or

Lib. Intr. 148. 149. This good, though the judg. were by non ſum inform. and no averment that it was without covin. Co. Lib. Int. 152. 11 H 4. 5. There a cap. ad ſat. was awarded for the damages.

or be condemned by *Non ſum informatus*, the judgement is the ſame, *viz.* to record the debt onely out of the Teſtators goods, and the damages of the Executors goods in default of the Teſtators: what if the Executor defendant, confeſſe that he have aſſets to the value of part of the debt, not of the whole? there for ſo much as is confeſſed the plantiffe may pray, and have judgement preſently without damages, and may maintain for the reſidue of the debt that the defendant alſo hath aſſets for the reſt, and ſo goe to trial, as appears both by the Printed book of entries, & another manuſcript which I have; But what if this trial paſſe againſt the plantiffe? Shall he then have an aditional judgment for damages in reſpect of the former? I think he ſhall have coſts, which cõmonly run, with or in the name of damages, but without a writ to enquire of damages, none being found by verdicts, the Court doth not uſually adjudge damages: yet in the book of Entries I find 6s. 8d. damages aſſeſſed by the Court upon a confeſſiõ in a writ of *Rationab. part. bonorum* againſt Exe. & this hath much affinity with the action of debt; Yea, in the very action of debt where the Jurors for miſcar-

But he may I think forbeare ſo to doe, and to the judgement for part aſ, that when more Aſſets come he ſhall have more. Lib. ſutra. Fol. 223.

Fol. 542.

carriage after their departure from the Barre were fined. I finde that the plaintiffe renouncing the assessment of damages by them made, and praying the Court to assesse the same, it was done accordingly: but this was a special case. M. 28. H. 6 Ro. a. 321 Lib. Intra. 329. a.

Whereas we before shewed that an Executor denying his Executorship, shall if it be found against him, pay the debt of his owne goods for his false plea; This thereabout occurreth to be added, viz. that that is only where the immediate executorship of the defendant is denied. For if B be made executor by A, & B dying makes C his executor; now if C be sued for the debt of A, as executor of B executor of A, and he denieth that B was executor of A, which by consequence is a denial of his being now executor of A, yet if this fall out in trial against him, he shall not in his own goods stand liable to this debt; because it is possible that he might not know to whom his testator was executor. So if A made B. C. and D his executors, and E is sued as executor of D the surviving executor of A, if E deny that D his testator survived B and C, by consequence whereof he denieth the truth, *viz.* that the executorship of A is de- See lib. Int. 322.

devolved to him, yet shall not this fou
against him, charge his owne goods, f
he might be ignorant of this point i
fact, *viz.* whether *B*, *C*, or *D* live
longest. And here he denied not his ow
immediate Executorship, but a mediat
or more remote Executorship; and so
I think is the Law where *C* being sued
as Executor of *B*, Executor of *A*, he
pleads that *A* by a latter testament made
himselfe Executor, which is found against
him, so as here he falsly pleaded, and
pretended himselfe to be the immediate
Executor of *A*, and so denied the me-
diate Executorship, *viz.* of *B*, to *A* and
of him to *B*. Yet *Quære* of this, for why
should not as well his false making him-
selfe an Executor immediate to the in-
debted Testator charge his owne goods,
as well as his false denying of that Exe-
cutorship; since both pleas tend to the
overthrow of the plantiffes action, and
each equally rested in the defendants
knowledg? But this difference is betwee
them apparent, *viz.* that the denyal
of Executorship, if true, is an utter, and
perpetual Bar to the plantiffe, as against
him so pleading; but the affirming of an
immediate Executorship, where he was

sued

ſued as Executor mediate, doth not ſo, if true, but directs the plaintiffe to a better writ or action, *viz.* againſt him as immediate Executor to the indebted Teſtator.

Where we have before touched upon the coming of Aſſets futurely to Executors, I thinke it is not amiſſe to conſider a little the forme and frame uſual in pleas of fully adminiſtred, which thus runne, *viz.* *Quod die impetr. & plene adminiſtravit omnia bona & catalla quæ fuerunt prad. S. temp. mortis ſuæ, & nihil hab. de bonis, &c. quæ fuer. prad. S. temp. mortis, &c.* Lib. Int. 151.

Thus tying his denyal upon the things which were the Teſtators at the time of his death; What if then the Executor have at the time of this plea pleaded goods, which were not the Teſtators at his death, but ſince accrued, as before is ſhewed, or perhaps a Leaſe for yeares ſold by the Teſtator upon condition to be void, if five hundred pounds not paid at ſuch a day, which hapning after the Teſtators death and default made, the terme returneth; Or if the Executor by a Writ of error reverſe a judgement given againſt his Teſtator for two hundred

7 H. 4. 39 Bro. 50 This plea is not good, per cur. becauſe ſome may have ſince accrued.

dred pounds, and ſo is reſtored thereunto: May the plantiffe now reply generally that he hath Aſſets which were the Teſtators at the time of his death? How can the Jury ſo finde, when the truth is not ſo? Surely this caſe is not common, nor can I ſhew a preſident of a ſpecial plea therein. But in reaſon me thinks it ſhould be ſpecially and not generally pleaded and ſet forth in the replication. And in caſe where one ſued as Executor, denieth that he was ever Executor or adminiſtred as Executor; I find ſometimes the replication general, that he did adminiſter without ſhewing wherein or how; and ſometimes ſpecial, ſhewing what thing was adminiſtred and where. Here note, that the Executor defendant denying (as he muſt) two things, *viz.* 1. That he never was Executor; 2. That he never adminiſtred as Executor, the plaintiff in his replication is tied to maintaine but the one of them as the truth of the caſe is; that is, if in truth the defendant were made Executor, but never did adminiſter: now it muſt be replied that he was made Executor at ſuch a place, without ſpeaking any thing of his adminiſtring. On the other ſide, if he did ad-

I. b. Intra. 322. a. b. but a place muſt be ſhewed So 21 H 6 19, 20. Br. 62

...miſter, but were not made executor, ... only the adminiſtring is to be repli- ... but if it ſhall be found that the defen- ... had adminiſtration to him commit- ..., and ſo adminiſtred by vertue thereof, ...n is the verdict to paſſe for the de- ...dant, for this is no adminiſtring as ex- ...tor; and upon a general denial there- ...this may be given in evidence, as the ...rd *Dyer* reports to have been reſol- ...ed. But if the plaintiff do in his replica- ...on maintaine both the points, ſhall this ...ake his plea double? Me thinkes it ...hould, yet I find it ſo replied, and no ex- ...eption taken for the doubleneſſe. *Tr.* 17. *H.* 8. *Rot.* 28.

So done Co. li. Intr. 144. b

Mich. 13 & 14. El. Dy. 305.

Lib. Intra. 312 b. Tr. 37. Eliz.

A ſole woman being executor, maketh ...deed of gift of the teſtators goods in ...uſt, but continueth poſſeſſion of them, ...nd marrieth *I S*, who alſo hath poſſeſſi- ...n of the goods, and in an action of debt ...y a creditor fully adminiſtred is pleaded: ...ow upon evidence the verdict ſhal paſſe ...r the plaintiff; for this alienation be- ...g fraudulent was void as to all credi- ...ors, and ſo as to the plaintiff the goods ...ontinued the teſtators, and ſo aſſets in ...he defendants hands, as was held in the ...kings Bench. If fully adminiſtred bee

pleaded where the defendant hath a
for part, but not ſufficient for all, and
it is found, yet ſhall not judgment be
ven for the whole, but for part preſent
with a further award, that when mo
ſhall come to the executors hand, t
plaintiffe ſhal then haye further judg
ment for the reſt, ſo as that falſe p
doth him no prejudice, but makes him
as good ſtate (the charges of trial exce
ted) as if he had confeſſed himſelf to ha
part. And I think the plaintiffe upon th
confeſſion of part, may pray the li
judgment, without maintaining that th
defendant hath ſufficient for the reſt; fo
if that be not true, why ſhould he be pu
to the charge of a trial by Jury? yet,
Sir *Edw. Cooke* at the Bar, *Tr.* 36 *Eliz.*
ſaid, that where fully adminiſtred is ple
ded, the plaintiffe is not tied to maint
the contrary, but may preſently pra
and have judgment to recover it wh
aſſets ſhall futurely come to the defe
dants hands, which was denied by ſom
but truely me thinks the Law ſhould b
as he ſaid, as wel as in the former ca
where for the part which the defenda
had not aſſets to pay, it ſo was done up
verdict ſo finding. But there, as I co
ceiv

Yet *Finch* 46 B 369 a. held the contrary, viz. that judgement ſhould be of the whole, but execution only for ſo much, and a Scire fac. for the reſt when more aſſets.

Sec. Cooke l. 8. fol. 134.

...e, it was not a preſent judgment, but ...award that he ſhould have judgment ...urely; ſo as after when aſſets come to ...defendants hands, the plaintiffe muſt ...re a *Sci. fac.* againſt the defendant, to ...ew cauſe not why hee ſhould not have ...ecution, but why he ſhould not have ...dgment, as I take it; yea, where it is found ...the defendant, that he hath fully ad-...miſtred, yet was it held by all the Juſti-...33 *H.* 6. 23, 24. and by *Priſot* 34 *H.* ...4. that when aſſets after come to his ...nds, the plaintiffe ſhall have a *Scire ...cias* to have ſatisfaction out of them: ...t there *Markham*, *Yelverton*, and *For-...ſcu* were of contrary opinion, and ſo ...as the whole Court, 4 *Hen.* 6. *fo.* 4. And it ...ands with great reaſon that whereupon ...verdict fully found againſt the plain- ...tiff, judgment is given *Quod nihil capiat ...breve*, there he cannot have any writ ...execute the judgment for him, but is ...t to a new action of debt; yet where it ...found that the defendant hath aſſets for ...t of the debt, but not ſufficient for the ...ole; there it is very congruous that ...plaintiff have preſently judgment for ...t, & after when more cometh, then by ...*ri fac.* againſt the defendant, obtaine

So. 19 H. 6 f. 37. 8 H. 4 fol. 25. See judgment ſo entred Co. lib. intr. 151. b.

So 7. E. 4. f. 9

judgment and execution for the reſt ... here both verdict and judgment were ... the plaintiff againſt the defendant, wh... plea, that he had no goods, was falſe, ... ſo found by the Jury. And this differe... was ſtrongly avowed by Serjeant *Ha... ham*, *Mich.* 33, 34 *Eliz.* and after app... ved by *Fenner* & *ſt.* 36 *Eliz.* none co... It is 21. H. 6 40, 41 tradicting it: yet a book was cited, t... the plaintiffe recovering ſo much as ... found in the executors hands, ſhould b... amerced for the reſidue, which *Pop...* Chief Juſtice denied to be law.

CHAP. XVI.

Where judgment ſhall be againſt the exec... tors own goods, though no plea of the d... fendant nor vaſtation do ſo occaſion: a... of the ſeverall manners of judgment ... ſeveral caſes.

HOw by waſting, called by us co... monly, a *Devaſtavit*, an execut... may draw downe the execution upon ... owne goods, hath formerly been ha... led and diſcourſed of, as alſo what ki...

pleas doe make the executors owne ods liable to the debt, and what not. w let us see where without mis-admi- ng or mispleading, yet the nature of action shall lay the whole debt or ng recovered upon the executors own ods. And this we shal find in some few es; 1. Where an executor is sued for t behind after his testators death, upon ease for years, made to the testator, and him left to his executor. Here it shall adjudged and levied upon his owne goods, for that so much of the profits as the rent amounted to shall be accounted his owne goods, and not his testators, therefore is he to be sued as well in the *Debet* as in the *Detinet*, where in other cases he is not, but in the *Detinet* onely, being sued as executor. So if any thing de- vered to, or detaind by his testator come to his hands, and he still detains the same after the demand, and be thereupon sued in an action of detinue; for this is his owne act: Nor in this case need he to bee named as executor, for he shal not answer damages for his testators detaining. So he assume to pay of his testators, ha- ng assets, and be sued upon this *Assump.* which debt is to be recovered in dama-

ges, and that upon or out of the ex-
tors own goods; yet is this action
the assumption which is the ground
of, founded in the Executorship,
his having assets; for if either he had
been executor, or if he had not as-
at the time of the promise, it had be-
Nudum pactum, & would not have bo-
him, nor given good cause of suit. Nay
goe further, in the case of assumption
the testator, and suit against the execu-
thereupon, we find the Judgment in
Plowdens Commentary given against t
executor generally, as if he had not be-
an executor, not fixing it upon the
stators goods; yet there the very debt
selfe is included in the damages. B
contrarily was it after in the seventh ye
of the late King, *viz.* Judgment give
that as well the damages as the co
should be levied of the testators goods,
so much in value of them were in the d
fendants hands; and if not, then the co
only of the goods of the executor. A
this surely is the righter and more j
way, for there is no reason, that upo
promise more then upon a bond, the L
should cast the whole debt upon the b
and state of the executor. But perhaps t

5 Mariæ fol. 112

Reade and Norwoods case. Co. lib. Intr. fol. 1, 2

tw

judgments may be reconciled thus, latter was given upon a verdict, *Non assumpsit* being the issue, and there the jury assessed damages in certaine, *viz.* [illegible] pounds with the costs. So as here the judgment was compleat and full *viz.* to recover the said sum; but in the other case the judgment was had upon a demurrer, so as the damages not being knowne, it was generally that the plaintiffe should recover his dammages against the defendant. *Sed quia nescitur quæ damna &c.* because it appeareth not to the Court what the damages were, therefore a writ was awarded to enquire of damages, upon the return whereof executed the judgment was fully and compleatly to be given of a summe in certaine; which second judgment it appears not by the book in what manner it was entred, and therefore might perhaps be then agreeable with the other. And that the said first judgment before damages enquired of, is not a plenary and full judgment, but an award of judgment, hath been divers times resolved, and that therefore any defect and insufficiency in the declaration may bee shewed time enough after the first, & before the second judgment. Yea,

Tr. 30 Eliz. Pasc. 33 El. in com. banc.

if the plaintiffe die before the ſecond judgment, though after the firſt, the action falleth to the ground: So if the defendant die; otherwiſe of death after full judgment. But this notwithſtanding, and howſoever it there were done upon the ſecond judgment, me thinks it were righter and fitter, that the firſt judgment ſhould expreſſe that the damages ſhould be had and levied out of the teſtators goods, for whom and in whoſe right the Executor is ſued.

So for rent behind ſince the teſtators death. Co. l. 5. fo. 31 the ſuit is in the debet as for his owne debt, M. 14 & 15 Eliz.

Another caſe there is wherein the judgment muſt be, as it ſeemes, againſt the executors owne goods, *viz.* in an action of covenant for a breach of covenant ſince the teſtators death; for ſo was it held both by all the Judges of Common Pleas, except the Lord *Dier*, and by the prothonotaries in the late Queens time, where the caſe was of an houſe upon the leaſe, negligently burned in the executors time, for which damages only were to be recovered. And ſometimes where the executor himſelf is ſo to bear the burthen, I find the Judgment entred, that the ſum recovered ſhall be levied of the lands and goods of the Executor.

Lib. Intrat. 329 a. & b. De terris & catallis, &c.

CHAP.

CHAP. XVII.

Of Women covert Executors.

THere being two kind of persons who have some disability upon them, *viz. Feme* coverts, or married women, and infants; touching whom we find in many places question and disceptation in our bookes: we will consider of them by themselves, or apart from others, yet not joyning them together neither, but each by himself separately.

First, therefore of *Feme* coverts, touching whom we will consider these three things:

First, whether they may make Wills and Executors, with or without their husbands assent, and how, whereof, and in what cases.

Secondly, whether they may be made Executors without their Husbands assent, or how their Husbands may hinder it.

Thirdly, what acts in execution of the executorship they may do without their Hus-

husbands, or their husbands with them.

Sect. 1. A woman married, or feme covert, we know is *Sub poteſtate viri, cui in vita contradicere non poteſt*, as ſaith the writ given by the Law to the wife for recovery of her Land after her husbands death, being alienated by him. Therefore it is that Judges, when a woman is to acknowledge a fine of any Land, do examine her apart from her husband, to know whether ſhe be willing, or come to doe it by the compulſion of her husband. It is therefore hard for her to have freedome of will, and conſequently freedom to make a will. Beſides, all her moveables or goods perſonal, which ſhe had at the time of her marriage, otherwiſe than as executrix or adminiſtratrix, are by the Law totally deveſted out of her, and ſetled in the husband as fully, *ipſo facto* upon the very marriage, as any other that were his own before: Of theſe therefore ſhe can make no diſpoſition, no more then of other her husbands goods. But in caſe ſhe doe by Will bequeath them, although the Will and gift be void, yet if the husband, as the caſe was in the time of *Edward* the ſecond

Select ſecreta examinatio.

Debts except, which are not properly good.

5 E 2 Fitz. deviſe. 24.

and, doe after his wives death consent to this her will and gift, by delivering of the goods bequeathed after her death, or assenting that the legatee take them by vertue of such will and gift; this amounteth to a new gift by the husband. If a woman have a Lease, an estate by extent, a wardship, the next avoidance of a Church, or other chattel real; these are not devested out of her into her husband by marriage, but in case she overlive him, they continue to her as before; no alienation or alteration having been made by the husband, who had power to dispose of them by gift in his lifetime, though not by his will; yet such a woman in her husbands life-time could not, of or for these things, without her husbands assent, make an Executor or Will, but she dying before him, they would, by the operation of Law, accrue to him. And here then observe a case, though not frequent, yet full of mischiefe when it happens: Suppose that a woman indebted a thousand pounds, and having Leases and moveable goods to the value of three thousand or foure thousand pounds, marrieth with I S. and then dieth before the debt be recovered a-

gainst

gainst her: in this case the husband shall have and goe away with all this value of his wife, and is not in Law lyable to pay one penny of her debts, because he is neither her Executor nor administrator. What the Chancery could doe, or rather what the Lord Chancellor or Lord Keeper would doe in this case, I will not take upon me to say or determine. Another sort or kinde of goods, or rather interests a woman may have, *viz.* debts or things in action, which as the former are not devested out of her by marriage into her husband, nor yet can she thereof make an Executor without her husbands assent, although they be one degree farther from the husband, then the said chattels realls, for that though the husband doe overlive the wife, he shall not be intitled to them as to the former: But if his wife make him Executor, as she may, or if after her death he take administration of her goods, then as he is thereby intitled to them, so is he liable also to pay her debts out of the same, when he shall have received them.

During her life he is, but not after.

But the husband may receive the or release them.

12 H 7. f. 22. The husband was sued in Spirit. Court as Executor to his wife. So she is often to former husband & to father, &c.

Lastly, *Dato*, that a woman covert is executrix to some other person, and in that right hath goods moveable; these are

are not devested out of her, because she hath them not meerely to her own use, but as representing the person of another: But whether then may she without her husbands licence or assent in respect of her being an Executor, and for continuation of this Executorship, make Executors, and consequently a Will or not? Hereabout hath been much diversity of opinion: Some bookes generally speake that the wife may make an Executor, but speake nothing of the husbands assent; whether necessary or not. Else-where we finde it mentioned, that if the husband after the wives death countermand (some books false printed say command) the proving of his wives will, then it loseth all force, or becometh void and of no value: but in this case is no mention in what state this wife stood, viz whether she were Executor or not, no not so much as whether she had any thing in action, or chattel real or not, so as nothing in particularity can be grounded upon that case. But there are express opinions that the husbands assent is absolutely necessary even in this case, so as without it the wives making an Executor shall be meerely void, and consequently,

39 H 6. f. 2[illegible]

34 H 8. S. Bro. Testaments 21.

18 E 4. f. 11. Vavasor Iust.

quently, he to whom she was Executor shall now by her death be dead intestate. And of this opinion was *Babington*, chief Justice in the beginning of *Henry* the sixt his time: Yet contrary hereunto was the opinion of *Fineux* chief Justice in the time of King *Henry* the seventh, *viz.* that where the wife is an Executor she may also make a Will and an Executor without any consent or assent of her husband. And to this opinion doth Master *Perkins*, after consideration of the books on both sides, incline. But some will say, that since all this, in the late Queenes time this hath been contrarily resolved, *viz.* in the case between *Andrew Ognell* plaintiffe, and *Underhill* and *Apleby* defendants, in the end of which Case, it is in expresse termes said to have been then resolved, that a Feme Covert or married woman, could not make an Executor without the consent of her husband. To this I answer, that this Case is to be construed with relation *Ad materiam subjectam*, viz. to the matter, and point in question, and under consideration; which was that state of a woman whereof we have before spoken, *viz.* one having things in action, debts

4 H 6. f. 31.

32 H. 7. 14. b.

Tit. devis. f. 27.

Mich 39. Eli. in Com. ba.

Cook lib. 4. 51. b.

debts or duties to her belonging, as there in particular it was arrerages of rent due to the woman before marriage. As for the point of a woman Executor to another person, it was never in that Case under disceptation, no nor once mentioned in the debate or arguments thereupon. Now considering the very form, and phrase of judgments at the common Law, which are thus, *viz. Ideo consideratum est per Curiam, &c.* not *Adjudicatum est*, that is, it is considered by the Court, not in expresse termes, that it is adjudged: This I say well observed (as to me it seemes very remarkable) gives us to know, that no more is adjudged then is considered of, the judgement being contained, and clasped up in the word *Consideratum est*. Wherefore since in *Ognells* Case, the point of a woman coverts ability in Case where she is an Executor, to make a Will and Executor, hath not been considered of, (the eyes, tongues, nor thoughts of the Judges, being not once set upon it;) It cannot be, that that point is there resolved or adjudged. Besides, even in a few words expressing, as to me it seemes, the reason of that resolution, it appeares

not

not to have been the intent of the Ju-
es, that the ſame ſhould reach or e-
tend to this Caſe, of a woman cove-
Executor: for it is added (as the re-
ſon of the judgement in my conceiving)
that the adminiſtration of the wive
goods doth of right belong to the hu-
band, which amounts to this in my un-
derſtanding, viz. that where the wive
making of a Will, and conſequently o
an Executor, may be prejudicial to her
husband, and prevent him of ſome bene-
fit or advantage, or tend to his loſſe,
and diſadvantage, there it ſhall not be
available or effectual without his aſſent;
and therefore not in the Caſe of her,
who having debts or duties to her due,
would by making another to be her Ex-
ecutor, exclude or preclude her husband
from that benefit, which to him ſhould
pertaine as adminiſtrator of her goods.
Now as for the goods, debts or credit to
her as Executor to ſome other pertai-
ning, no benefit could redound to the hu-
band by having ſuch adminiſtration o
his wives goods, for thoſe ſhould goe,
and be to the next of kinne of the wives
Teſtator, taking adminiſtration *De bonis
non adminiſtratis* of him, if ſhe have no

Execu-

tor; and therefore her making
cutor as touching these, brings no
or prejudice to her husband, and so
of the reason of *Ognells* Case. Since
it is so, and since the Law favour-
wills, and it was by implication part
his will who made her Executor, that
should have power to continue his
cutorship by making another to suc-
therein after her decease, for perfor-
ce of his will; why should the Law
to the Husband who can receive no
judice thereby, power to give impe-
ent thereunto? for *Frustra est in-*
potentia, even reason it self frames
awards against him in this Case a
Quare impedit, or rather, a *Non impedit*,
to me it seemes. Wherefore to con-
de, I take it that the opinion of *Fineux*
good Law in that point of a femme co-
Executor, though not in the other
nt, where she only hath dets, or things
action to her self due; for therein the
resolution in *Ognells* Case, grounded
on good reason, gives me satisfaction to
fer from *Fin.* who making no difference
tween the cases, held the husbands assent
edless in both. *Posito* then, that the
of *I S* having debts due to her self,

and being also Executrix to *I D*, m
without her husbands assent, *I N*
executor, and dieth; what shall we n
say? shall we say, that as touching
goods and credits, or things in action
her as Executrix of *I D* pertaining, th
will stands good, and *I N* as her executo
may prove it contrary to her husba
will; and that as to the credits to
selfe in her owne right pertaining, th
will is void, and thereof her husba
may take administration? Shal she di
both testate and intestate; with a wil
and without a will? shall she have bot
an executor and administrator? why not,
to several purposes, as wel as where a
Note. executor is made onely for one partic-
lar thing or one place, the testator ma
elsewhere die intestate: And so where
the executorship is divided, as before
shewed, and one to whom part is com-
mitted will prove the will, but the othe
to whom other part of the executorship
committed, wil not take it upon him: here
must needs be a dying for part testat
and for part intestate.

As for the second point, *viz.* wives o
women coverts being made executors, an
so having the office of executorship p
upo

them against their husbands will, 13 Ed. 1. Fitz. Exec. 119.
e hath also been diversity of opini-
In the time of King *Edw.* 1. *Brad.*
ce saith, she may be executor without
husband, and the administration shall
elivered to her only. And I think he
nt that this might be without the
ent of her husband, or whether hee
ld or not; for so it is said in the
of King *Henry* the seventh to bee 2 H. 7. 15. b.
Law spiritual: and indeed in Courts
itual no difference is made betweene
men married and unmarried, for
t I can find. There a wife sueth,
is sued alone without her husband;
ntermeddleth not, nor is intermedled
all touching the things pertaining
his wife. But at the common Law
otherwise; and there, as *Bryan* chief 2 H. 7. 15
ice saith, a wife without the assent
her husband cannot be executor, hee
ming thereby, that the husband may
ose and hinder it: for such a one
be named Executor in and by a Wil
out the knowledge of her husband:
then see how after the death of the
tor, the husband can hinder her pro-
the Wil or intermedling to adminis-
ince it may be a matter both of much

trouble and danger to him, to have
executorship fasten upon his wife,
consequently upon himself. On the
ther side, it may be a benefit and adv
tage to the husband, and therefore we
also consider whether the husband
(though his wife would refuse) assu
the executorship, and fasten it upon h
The testator therefore being dead, & fa
or common bruit carrying it to the O
dinary, that the wife of *IS* is made exec
trix; if she come not in *gratis*, or vol
tarily to prove the Wil, *Proces* or c
tation is to be sent out of the spiritu
Court against her, to enforce her com
in to take on her the executorship. Sh
coming, may cleerly, as wel as any oth
person (especially if her husband conc
with her therein) refuse this office, tr
and charge, so as if there be no other ex
cutor named, the Ordinary must com
the administration: If shee should n
come and appeare, she should bee c
communicate, as I take it, notwithsta
ing any allegation or intimation by h
husband of his unwillingnesse to ha
her take upon her the executorship. I
suppose she doth come into Court, a
offers her selfe ready to take the Exec
tor

ship upon her, and on the other side husband expresseth his dis-assent eunto, praying that shee may not e the execution of the Will to her com-ted: what wil then be done? This I fess pertains to another learning, and to that of our possession: but forasch as I find that in the Courts spiritua wife stands in the same plight & state a woman sole, the husband not interdled withal in the affairs of the wife; erfore do I conceive that in that Court husbands refusal wil not be of force hinder the committing of the executorip to the wife not refusing, at least if ere come not a prohibition to stay the piritual Courts such proceeding: but whether a prohibition be in such a case be granted or not, as I find no resolun in my books, so wil I not take upon to resolve. This stands cleere in the les of the Law of *Eng.* that the wife is 33 H 6. 31
nder the husbands power, and cannot 43, 39 Ed. 3. 1
ntradict him in pleading and doing o-er acts even touching her owne Free-old: nay she cannot take lands nor goods 27 H 8. 14
gift or conveyance, without her hus-nds assent, as the law hath been, and for ught I know, is taken. But if once the

Will be proved, and the execution th
of committed to the wife, though ag
her husbands mind and consent, I th
it will stand firme; and the husband
wife being after sued cannot say, that s
was never executrix: and I doubt wh
ther the wife administring without th
husbands privity and assent, althou
the Will be not proved, do not conclu
her husband as well as her selfe, from sa
ing after in any suit against them, th
shee neither was Executor, nor did eve
administer as Executor. Yet perhaps th
administration by the wife against he
husbands minde, wil (as against him) be a
a void act, else cannot I see how *Brian*
opinion before cited, *viz.* that the wife
shall not be an executor, without or
against her husbands mind, can be law.
On the other side, if the husband of a wo-
man, named executor, would have his
wife to take upon her the execution of the
Will, and to prove the same, but she will
not assent thereunto (wishing perhaps
that gain and benefit rather to some of
her kindred by a way of administration,
then to her own husband by her execu-
torship, as sometimes wives accord not
well with their husbands) in this case I
think

11 *H.6.4* The plea is that the Femme did or did not administer, without speaking of the husband.

33 H 6. 21 The husband may administer and prove the will for his wife.

the Court ſpiritual wil not faſten executorſhip upon the wife againſt wil. But *dato*, that the husband, though Wil be not proved, doth adminiſter as the wives right, but againſt her minde wil, ſhal ſhe be now hereby bound & concluded, ſo as after ſhe cannot decline avoid the executorſhip; and ſurely I nk, that during her husbands life ſhee nds concluded at the common law, for t there ſhe ſhal not be, nor can be ſued one as executor, and then being ſued h him ſhee muſt joyne in plea with , *viz.* that ſhe neither was executor, adminiſtred as executor, and then is act of her husbands given in evidence l, as I take it, cauſe that the verdict be nd againſt her: not ſo after her hus- nds death: then ſhee may refuſe as the rd *Dyer* ſaith, and citeth, as reſolved. eſe things I thought good to offer to ſideration, and ſo leave them without ſolution. Difference perhaps may be, here a woman ſo made executor taketh husband after the teſtators death, be- re either proving or refuſing to prove e Wil, and where ſhe is made executor ring the coverture, as there in caſe of a ſcent of her land to the heir of a diſſea-

1 Eliz. Dyer 166 b. there is cited 5 Mar. 113. *Nota per Bill.*

for; for when there is upon her such state of election, she marrying before her resolution or determination, doth upon the matter deliver it into the husbands hands: not so where it first findeth and faleth upon her in the state of coverture: if the husband were indebted to the Testator, this making of the wife executor is as I take it, a releaſe in law, as wel as if she were the debtor, but if after the teſtators death she do marry ſuch a debtor, it is a devaſtation.

The third Point.

Touching the administration or execution of the Office of an executor by a Femme covert and her husband.

WE wil now come to admit the execution of the wil aſſumed by concurrent conſent of husband and wife, and the wil proved with both their liking in the wives name; and examine what acts the wife of her ſelfe is able to do, and what her husband without her.

It hath been conceived by many of old, & by ſome of late, that if a Femme covert or married woman executrix releaſe a debt of her teſtator, or give away the goods which ſhe hath as executor, or deliver a legacy bequeathed, it was firm and

good

[illegible]d; and on the other side, that her husbands gift or release was of no value, for that the administration or execution of the will is committed to the wife onely, and some have gone so far as to say that she may sue or be sued without her husband (in the Courts of Common Law, I mean) for in the spiritual Court it is true, the husband is not joined with the wife in suit;) but the law is doubtless in all those points contrary, as not only some opinion also was of old, *viz.* in the time of *H.* 7. but also hath been in the late Qu. time resolved: for otherwise, if the wives gift or release should stand good, her act might exceedingly endamage her husband, and make his goods liable to the creditors, the testators state being wasted by the gifts or releases of his wife. Wherfore it was held in the said late case, that unlesse due payment were made to such women covert executors, their releases or acquittances be void, and so also their gifts and grants: yea it was then held that the husband of the wife executrix, may give goods or make releases of debts at his pleasure. But doubtless by marriage, neither are the goods (though personal) which the wife hath as executor, devested out of her and

See 18 H. 6. 4. In debt the plea shal be that shee hath fully administred and replie that shee hath assets, never mentioning the husband.

33 H. 6. 33.

and ſetled in her husband as her own goods are; nor if ſhe die, ſhal they accrue to the husband, if no alteration were of the property, but ſhall go to her Executor or to the next of kinne, being administrator of her teſtator, if ſhe have no Executor; and ſo was it held in the firſt yeare of Queene *Mary*: Yet though for any other goods which the wife had in her owne right before marriying, the husband alone without naming the wife may maintaine an action of treſpaſſe; yet touching ſuch goods as the wife hath as Executor, the action muſt be brought in the names of the husband and wife, to the end that the damages thereby recovered may accrue to her as Executor in lieu of the goods. So alſo muſt the replevin for thoſe goods be in both their names. But although the husband be thus named with the wife, yet principally is it the ſuit of the wife, and therefore in ſuch actions or in debt by husband and wife, ſhe being Executor, if it come to tryal by Jury, the husband being an alian, yet ſhall he not have trial *per medietatem linguæ* or *alienigenarum*, that is, by halfe aliens, as in other caſes, where an alien is party to a ſuite,

M 31. El. in cō. b. If the husband be to avow, it muſt be in the right of his wife Executor or adminiſtrator *Manſields caſe.* Doctor Julius his caſe.

is to be had. And where to a wife Executor, power is given to ſell and of the Teſtators; ſhe may ſell to owne husband, as was reſolved in time of King *Henry* the ſeventh, here the Feoffees (it being Land ſet- in uſe) were committed to the Fleet, that they would not execute an e- ate to the husband, according to the ves ſtate. But of this I much marvel, ce the Law intends the wife ſo under he husbands command and ſubjection, at it holds not her diſpoſition of land him by will free, nor therefore of ce, and how ſhall this then be conci- ed to be but a partial ſale; yet *volenti n fit injuria*, and he that will put ſuch ower into the hands of a woman under overture, doth in a manner ſubject it voluntarily to the husbands will. And it hath been held by ſome, that even infants or feme coverts conveyance in ſuch caſe of neceſſity ſhould ſtand firm and unavoidable, becauſe of the con- dition expreſſe or implied, that the ſtate ſhould be void, if no ſuch conveyance made.

10 H. 7. 20.

Bro. Juſt. *Cui in vita* 15. She may ſell to any other, but not to him.

Fenner Juſt. in ba. reg. Paſc. 37. El. & 34. E. 3. Bro. *Cui in vita* 15. No prejudice to them that ſe be good.

Touch-

CHAP. XVIII.

Touching infants, and their making or being made Executors.

BEing now to consider of disability by age, for want of yeares in persons making or being made Executors: Let us first take view of the several ages of men and women to several purposes material in the lawe judgement and respect. And first, touching a woman:

1.

25.H.6.21.b. *Wangford* in *Henry* the sixth his time shewes, and other bookes approve that she hath six several ages, respected in and by the law. As first, the age of seven years, for her father to have aid of his tenant to marry her. Next nine yeares to deserve dower, that is, that in case she be of that age at the time of her husbands death, she shall be endowed; but not if she be any thing under those yeares; the Law being Physically informed that a woman at those years may conceive a child, but not under them. But of somewhat different opinion was, as it seems, the Par-

2.

18.Eliz. c.7. liament in the late Q. time, when it was made felony to have unlawful carnal knowledg of any woman child under the age of ten yeares, it being then conceived

d, as I thinke, that no ſuch could con-
t. The age of twelve yeares is a 3.
mans time for aſſenting or diſaſſent-
g to marriage in more tender yeares
d. For ſo it appeares by divers books,
hough Mr. *Littleton* have here no di-
ſtinction between male and female. The
e of fourteen years is a womans time 4.
o be in wardſhip or not, ſo as if ſhe be
y thing above thoſe years, at the time
her anceſtors death, ſhe eſcapeth ward-
ip. The age of ſixteen years is her time
coming out of wardſhip, being once 5.
allen under it; for although had ſhe been
ll fourteen, ſhe had eſcaped it; yet not
being at the time of her anceſtors
eath, her wardſhip laſteth till ſixteen
ears, except the Lord ſhall ſooner marry
er. And laſtly, the full age of a woman 6.
whereby ſhe is inabled firmly and una-
oidably to make grants or conveyances
21. years, as well as for the male, before
which time, be it that ſhe being ſole,
make a feoffement or other conveyance,
or being married alien her land by Fine,
and her husband of full age joyn with
her, yet is it infirm amd avoidable.

Now of the male, or man, the firſt 1.
age material and ſetledly reſolved on,

18

is twelve yeares, for at that time each male is at the Leet to sweare his fidelity to the King; this women doe not, and therefore are they never said to be outlawed, but to be waived, because they have not this admittance into the Law which males have. This hath been, as I thinke, the ground of that speech, That women are lawlesse creatures.

2. The second age of males is fourteen yeares, accounted by the Law, the age of discretion, especially material to two purposes, viz. First, that if one under that age commit an act amounting to felony, yet is he to stand free from the attainder and punishment incident to a felon: Regularly it is thus, but *non est reus quis fuit*, one of much lesse yeares having attained ripenesse of discretion and discerning, shall incur the like attainder as one of full age, as was resolved in the time of King *Henry* the seventh, touching an infant but of the age of nine yeares, who having killed another boy of like age with his knife, and then hiding the slaine boy, and excusing the blood found upon him, by saying that his nose had bled: It was held by the Judges that he was to be hanged as a

3 H. 7. f. 1. 6.

felon,

on, his such non-age notwithstand-
The other point, touching which
age of fourteen yeares is especially
terial, is touching an heire of Lands
ld by Socage; for in case such heire be
der that age, he is to be in ward to
next kin; but if he be of that age, he
not to be in ward at all, for that the
w judgeth him to be of discretion at
ose yeares, and therefore a Guardian
Socage being in effect but a Bayliffe
countable, he hath no need of such
one, other then such as himselfe shall
ose.

The third age in and touching males 3.
terial, is fifteen yeares; for every
Lord of a Manour, or one having Free-
olders in Socage, or by Knights Ser-
ce, when his eldest Son cometh to that
ge, viz. fifteen yeares, is to have of
em ayd for the making of him a
Knight, towards which every one hold-
g by a whole Knights Fee is to pay
enty shillings, and so ratably for more,
ore; and lesse, lesse: and each hold-
g twenty pound Land in Socage is to
y the like sum, and so ratably for more
lesse.

The fourth age of males, is the full 4.
age

age of one and twenty yeares, which maketh him free from wardſhip, having Lands held by Knights ſervice deſcended unto him: And alſo makes him able to alien Lands or goods, makes firm his bonds, ſtatutes, recognizances, &c. for although at fourteen the Law judge him of diſcretion, yet doth it not hold him fully ripe till one and twenty.

5. Ultimum. Another of 60. to exempt from being compelled to ſerve by the ſtat. of labourers. 23 E 3. c. 1. W. 2 cap. 38. 13 E 1. no. na. br. 165.

The laſt age of males reſpected by the Law, is ſeventy yeares, at which time Sheriffs are to forbeare to impanel them in Juries, and in caſe they doe not, ſuch old man may have a writ to the Sheriffe, grounded upon the ſtatute for that purpoſe, made in the time of K. *Ed.* 1. commanding ſuch Sheriffe to forbeare the impanelling of him; and he may have an action to recover damages upon that ſtatute: This is called by moſt a writ of Dotage, a word, perhaps, anciently taken in a good and favourable ſenſe, *Prodote ætatis*, viz. a gift, priviledg, or exemption allowed to age in favour thereof, and as a benefit. Having thus by way of ingredient or introduction taken view of theſe ſeveral ages, let us now ſee wherein and how age is material, touching them who are to make or to be

executors, and what age is required about. Master *Perkins* saith, that of foure years old may make a will, consequently executors; and his reason is, because the executors being to account before the Ordinary, it cannot be intended, but that the goods shall be distributed for the good of his soul: He makes as if he only made an executor by his wil, but did not bequeath any thing, but left all to the executors conscience and discretion, which is not usual, though possible, as before I have shewed, or at least. But admit it were so, and no bequest at all contained in the will, since at that age an infant hath no discretion to elect a fit person to distribute the goods, money, and other things; no power to make continuation of an executorship to another, to whom perhaps the testator was executor: I cannot see that his will should be of any force: but if he be of the age of 14 years, being the age of discretion in the judgment of law, then I would hold him able to make a will, although yet he be an infant til twenty one years, and can make no gift of land nor goods which shall be of force. And *Bagington* chief Just. to other purpose makes 9 H. 6. fol.

Devises. [97] No good reason, for one may make an ill account, specially having a childs direction for his doings.

like diſtinction betweene an Infant of ſuch tender yeares, and one come to the years of diſcretion. So alſo as before we ſhewed, is it in the caſe of felony. And that way alſo ſounds that which *Hawk* ſaies in *Henry* the fourth his time, *viz.* that an infant of 18 years old may be a diſſeiſor; as implying that his yeares may be ſo tender, that as *Candiſh* ſaith of an infant in *Edward* the third his time, he is not to be intended able to know or diſcerne between good and evil: me thinks therefore he ſhould be at the leaſt of the age of diſcretion, *viz.* 14 years, who ſhould bee able to make a Will, and conſequently an Executor. And the cuſtome for an infant of fifteen years old to bequeath by wil hath, as to me it ſeems, affinity with this opinion, though there the Caſe was of land in a Borough deviſable by cuſtome: and that way reflecteth the Caſe in the time of King *Henry* the ſixth, where it was ſaid, that an infant under fifteen years of age ſhould not wage his law, *viz.* take an oath to acquit himſelf of a debt, or excuſe his default in an action real. And further reaſon of this opinion will ariſe out of the conſideration of an infant made an executor.

2 H. 4. 23

40. Ed. 3. 44

37 H. 6. 5

11 H. 6. f. 40

Now

Now touching an infant made execu-
, how young ſo ever he be, the ma-
of him ſo is not void, but yet the
tution of the Wil, which is the per-
mance of the office of Executor ſhall
t be committed to him till he come to
age of ſeventeene yeers, by the law
ritual, and till then (for that he is
t able to do the part of an executor,)
miniſtration is to bee committed to
e other; yet if it be a woman infant
o is ſo made Executrix, in caſe ſhe be Co. lib. 5. fo.
rried to a man of ſeventeen yeers old 29 p.
more, now is it as if ſhe were of that
, and her husband ſhall have the exe-
ion of the Will, and if adminiſtration
re before committed during the mino-
of the woman, it ſhall now ceaſe, as M. 41 & 42
aid in *Princes* Caſe. Yet I doe a little Eliz.
vail at theſe opinions, conſidering
t theſe things are managed in the Spi-
al Court, and by that law; and
termedles not with the husband, in
wives caſe; now by that Law, and
our Common Law, comes in this li-
of ſeventeene years. And I have
it otherwiſe reported in and touch-
the laſt point.

Further touching Infants executors

Co. l. 3. f. 29 That paiment is to bee made to the Executor, and not to the adminiſtrator, M. 15 & 16 El. in Com. B. rep. 67. Co. li. 5. fo. 29.

and under the age of ſeventeene yeares, this is to be noted, *viz.* that ſuch an executor is not able as an executor to aſſent to a legacie, ſo as it may by vertue thereof ſettle in the legatee. Alſo if adminiſtration be during ſuch minority committed with ſpecial words of reſtraint or limitation, *viz.* that it is done to the uſe or profit of the infant executor, then no ſale of leaſe, or goods, or aſſent to legacie by ſuch adminiſtrator, will bind or preiudice the infant executor; but otherwiſe perhaps, if the adminiſtration during the minority be committed generally: and if the teſtator himſelfe, making an infant Executor, doth alſo appoint another to be his executor during his nonage, expreſſing it to be only for the benefit and behoof of the infant executor, I doubt whether this temporary executor ſhall any whit reſtrained from what pertaines to the power of an abſolute executor; for there may be perhaps difference betweene him to whom the owner of the goods commits the government of them, though but for a time, and in ſpecial manner; and an adminiſtrator ſo ſpecially made by the Ordinary, another being preſent, by the will of the owner or teſtator to

Co. lib. 6. fo. 671

have

ve the administration, in whom for a
e legall defect is found. But now let
passe over this age of seventeene,
d consider of the infant betweene that
me of his being admitted to take upon
m the executorship, and his accomplish-
ent of his full age of one and twenty.
irst then, suppose that he doth release a
bt due to his testator, whether shal this
e good to bind him, and to discharge the
debtor as wel as if the executor had been
of full age, he now having proved the
Will, and being by the Law Spirituall
approved an able executor? And this
point coming in question in *Russells* Case, H. 26 Eliz.
in the late Queens time, consideration
was had both of divers good reasons for
enabling of this release, as that an execu-
tor represents the person of his testator,
and in his right and power, doth these
acts, and not in his owne, and there-
fore his infancy, which is a state or con-
dition of his own natural person, shall no
more disable him, than it doth the King,
a Major, or other Head of a Corporati-
on. Also divers books were found to run 16 H. 6. Re.
that way, as wel in the case of an infant, 45. 21. E.
as of a Femme Covert. But upon great 13. 24.
deliberation in the Kings Bench, and

upon conference had with the Lord *Anderson*, *Manwood* and other Juſtices, it was reſolved and adjudged that the releaſe of an infant Executor without payment of the debt and duty would not bind or bar him: 1. For that if it ſhould, it would bee a waſting or devaſting of the goods of his teſtator, and ſo would charge his owne goods. 2. It would be a wrong, which an infant could not do by his releaſe. 3. It was no purſuit nor performance of the office or duty of an executor, but the contary. And upon this judgment, a writ of error was brought in the Exchequer Chamber, where it was agreed by all, that the releaſe was not effectual nor binding, ſo as this point now had the reſolution of all the Judges of *England*. But it was agreed, that if payment or ſatisfaction had been made, then the infant executor might have made a good acquittance and diſcharge, and indeed payment it ſelf if proved, brings diſcharge enough, except in the caſe of a ſingle Bill; Note that the principal caſe adjudged was not a releaſe of any debt or duty by ſpecialty, but of treſpaſſe in converſion of goods found or taken in the teſtators life time. But *Poſito*, that this infant

Co. lib. 5. fol. 27.

fant had assented to a legacy, whether will this bind him or not? for in the case of *Russell*, it is said, that all things which an Infant doth according to the office and duty of an Executor, will stand firme; now it is part of his office to pay and execute legacies. Yet since this act amounts to a vastation or wasting of the testators goods, as well as the other, in case there remain not goods sufficient for paiment of the debts, and consequently here as well as in the other case, the infants own goods would become liable to his testators debts; I doubt, and incline, that it is not, nor can stand effectual, for except in the other we admit a want or possibility of want of assets or goods, the release could neither hurt the infant himselfe, nor do wrong to any other; and that admitted, this case is of like prejudice; yet if those assets should be void, so also would be his payment of legacies, and how then were he an able Executor, at the age of seventeene years, to sue, and to be sued for debts, and legacies, and and if upon suit it cannot be shewed that debts wil take up all, or disable the payment, then haply he may be forced to pay; Quære notwithstanding whether

these acts (though voluntary) stand not good upon *Bene esse* or conditionally, viz. if there be besides goods sufficient &c. or that else the nonaged exec. may have an action of accompt for the mony by him paid to the legatee, and also avoid his assent where that only needful. But doubtless neither the assent of such executor before his age of 17, nor any paiment of a debt to him could be good, although such acts to or by another executor, before the proving of the Wil would stand firm and good: for this infant wants not only proving, but also ability to prove his testators Wil, yea, the Wil stands suspended, & the testator as it were intestate, whilst the administration stands in force, so as during that time nothing can be done by any as exec. & therfore there is great difference betweene the cases. What if paiment of a legacie be made to an infant, can he make a sufficient acquittance? This I confess is besides the point in hand, yet because it concerns infants, and executors (though not infant executors) it is not amiss here to cast some thoughts, & words upon the point, for that it many times perplexeth both executors, and legatees. First therefore in case the infant be of the years of discretion, *viz.* 14. I hold it

cleare

feare that any payment to him made will stand good, for that the Law at that age holds him able to govern, and manage his own Lands held in Socage, and consequently to receive the rents thereof, wherefore, whether he who makes such payment have any acquittance or not; if he have proof of the payment, he is well enough acquitted from any second payment; and if without payment he get an acquittance, it will not suffice, the infancy of him who makes the acquittance considered. Besides, if the acquittance be, as most usually they are, but signed only with the name of the maker, and not sealed, it is only an evidence or proof of payment, and no pleadable acquittance, because no deed, so as it nothing differs frō proof by witnesses, save that it is not mortal as they But now if the infant be under the years of discretion, what shall we say to a payment to him specially, if he be but 3. or 4. yeares old, or thereabout? here I think caution is to be used by the Executor generally, and the surest way is, if he feare to keep it in any respects, to pay it into the Court, where it is recoverable, viz. where the Will was proved; yet the case so may be, as that this may

Notes of receits called acquittances.

payment may not be at all safe for the executor. As put the case, that he enter into bond or statute to pay all legacies by such a day, to the several legatees here I think the payment into the Court Spiritual sufficeth not, for that must make the receit to be, with some charge, which is in some kind an abatement; there I think therefore legally to secure the executor, the paiment must be to or in the presence of the guardian, because of nature, *viz.* him or her who hath (though not as guardian in respect of lands) the custody or education of the infant: for otherwise to pay it into the hands of such a tender infant separate from any governour or guardian, were to expose it to losse, both for that he is not able to count the summe, and for that he yet not being come to discerning years were like with *Æsops* Cock, to part with pearles or coine for plumms and trifles of no value. But in case no bond nor other collaterall penalty lie upon the Executor, or in case the bond or statute be, only to perform the Will generally, which nothing alters the course of payment, which by the Will the Law laies upon executors, then is not the executor put to any such paiment

Quere.

nor

need pay without demand, and ac-
tance, as in case of paiment, upon a
le Bill, or of rent seck where no di-
sse can be taken, nor other penalty
urred: yet in that case if demand be,
acquittance ready to be given, let the
cutor take heed, in case he be bound
performance, that he stand not upon
invalidity of the acquittance in re-
ct of nonage; for as I have said, proof
witnesses may supply a nullity of ac-
ittance, and much more the weakneſſe
imbecillity; payment according to the
stators appointment, being the matter
hich acquitteth the payer, and this the
ecutor may have testified under the
ands of divers witnesses expressing cir-
mstances, so as all dying, he may con-
inue safely from second payment as well
s if an acquittance had, the witnesses
hereunto are subject to mortality, as
el as the other. But herein Courts of e-
quity doe often interpose helpfully for
em who seek not evasion from paiment,
ut only security in paying. And of infant
executors, and by occasion thereof, of
infancie in Legators or legatees, thus
much.

CHAP.

CHAP. XIX.

Of Legacies.

ALthough these be not recoverable at and by the Common Law, but most naturally at and by the Law Ecclesiastical, yet by suits in Courts of Equity, as the Chancery and Court of Requests, they are often obtained, and of many things touching them the Common Law taketh notice, and hath manifold occasions so to doe: we will therefore consider thereabout these parts or points, some whereof have been in part before touched upon other occasions.

1. Whether any legacie in certaine & lying in prender may be taken, or had, without the Executors assent, by the legatee, or him to whom it is bequeathed?

2. When an Executor can, or safely may pay, deliver, or assent to a Legacie?

3. Whether one Executor alone may doe it, and what if the Executor be an infant or woman covert?

4. What shall amount to an assent of the Execu-

ecutor, and what to a diſaſſent or diſ-
lement of aſſent ?

How a Leaſe or chattel real may be 5.
ven to one for a time, with remain-
r to another, how not ?

Where an aſſent to the firſt or one 6.
rt of the bequeſt, ſhall imply or a-
ount to an aſſent for the reſidue.

Of the manner of aſſents, and therein 7.
aſſents conditional.

What manner of intereſt he in the re- 8.
ainder of a Leaſe after the death of a-
ther hath during the life of that other,
nd whether he may diſpoſe of it during
hat time and how ?

Whether this remainder can be defea- 9.
ted by any act of the deviſee for life, or
by the death of him in remainder firſt.

By what acts or accidents a legacy may 10.
e forfeited or loſt, and therein of revo-
ation, death before, &c.

Whether the executors aſſent ſhal have 11.
relation to the teſtators death, and ſhall
make good a grant before made by the
Legatee.

If the executor give it to another, the legatee hath no remedy at the Common Law, *per Priſot.* 37 H. 6. 30.

As for the firſt, we have before ſhewed the aſſent of the executor to be neceſſary before any legacy can be had, for that debts are firſt to be paid, & that the exe. is

to

to look to at his peril. But hereto adde a little out of M. *Swinborne* a learned Civilian, who saith, that in case any goods be in the hands or custody of *I S*, and the owner doth bequeath them to him, then may he keep or retaine them against the Will of the Executor, so as there be other sufficient goods in the hands of the Executor for payment of all debts: but though this (as it seems) would it stand in the Ecclesiasticall Law, yet for that no property is transferred to the legatee without the executors assent, therefore doubtlesse the executor may at the Common Law recover the thing with-held, or damages to the value against the legatee detaining it. Another case there is, wherein as the learned Civilian saith, the legatee may take the thing to him bequeathed, lying in prender, *viz.* Horse, other beast, or peece of Plate, or other like thing known, and in being, and that is where the testator doth expresly so appoint by his will. But herein doubtlesse the Common law, at and by which debts are recoverable against executors, will oppose the Law Spirituall, for else by such appointment the testator might cause all his goods to be taken by legatees, and that none

ne ſhould remaine to pay debts. Yet there be other goods beſides ſufficient for payment of debts; then inded ſee not how the Executor can hinder ch taking without violating his oath ken for performance of the will. If y ſay that it is alſo a breach of oath in e other caſe, I ſay, he obſerveth not at there that clauſe in the will being ainſt the Law, is void, and conſequently there is a nullity upon it, and it is as if o ſuch thing were in the Will, and ſo e oath extends not to it. And as a chattel ſhall not be transferred to a ſtranger without the Executors aſſent; ſo if the deviſee be to the Executor himſelfe, till he elect to take as Legatee, it ſhall be to him as Executor, as appears by the ſtrain and argument of two caſes in *Plowd.* Comment. and more lately in the Kings Bench, the point being divers dayes argued, was at laſt ſo reſolved by three Judges againſt one: and the reaſon of *Cook* at the Barre was very good, for here the Executor ſuſtaines two perſons, viz. an Executor, and Legatee, and ſo all one, as where the bequeſt is to another, for *Quando duo jura concurrunt in una perſona, æquũ eſt ut ſi eſſent in diverſis.*

Welchden and Elkington. Paramour and Yardley. Portman & Simmes caſe. Trin. 37. Eli. Allbut Cawdy ſo agreed.

As

As for the ſecond point, it may have theſe two parts: Firſt, when the Executor is able to give ſuch aſſent to a legacy. And ſecondly, when he may doe it with ſafety. As for the firſt, he is able before *probat* of the Will to aſſent unto the execution of a legacy, as elſewhere is ſhewed, and that although he be not of full age of one and twenty yeares: but if he be under ſeventeen yeares, ſo as he is not able to take upon him the office of an Executor, and therefore adminiſtration is during that time to be committed to ſome other; Here his aſſent is not of force or effectual, as we find in *Princes* caſe to have been held in the caſe of *Pigot* and *Gaſcoine*. As for the ſecond part, till all debts be paid, the Executor may not ſafely conſent to put the Legatee into the Leaſe or chattel deviſed, no more than he may pay money bequeathed, if there be not ſufficient alſo to pay all debts. Of theſe things more is ſaid elſewhere. Yet becauſe the Reader, or he that deſires direction in theſe points will looke for them under this title, I thought not good here to be altogether ſilent touching them.

21 El. Dy. 367.

Co. li. 3. f. 29.

As for the third point, viz. Whether the

he assent of one Executor, where there e many, be sufficient, I see not how to doubt, since any one Executor may give away any goods of the testators, or release any debts due to him, therefore much more assent, which is no more or greater work in effect than an atturnment of one lessee upon a grant of a reversion. And if there want to pay debts, he onely who assented shall answer for t of his own goods, and not his companions. But if this Executor be either under the age of seventeen years, or under coverture, viz. a woman married, such is not able to give a good assent to binde the others, no nor themselves, for then thereby the Infant might draw a debt upon himself, and the wife upon her husband, by assenting to or paying of a legacy, there not being sufficient goods to pay all debts. But the husbands assent is sufficient where the wife is Executor; for his acts whom she hath chosen to be her head, may prejudice as well her as himself; yea though she were within age, yet he being of full age, his assent will stand good. But if he or another Executor in his own right be above 17. years of age or under 21, I doubt whether now

6 H 7 5. If the bequest be to one of the Execu. he may take it without assent of his companions, yet if a debt, his companion may release it. 48. E. 3. 14. 15. So held where but one of the executors during nonage assented, in the case of Rhetorick and Chapel. H. 9 Jacobi. Rot. 895. in Ba. Reg. C.

his assent will be sufficient, at least except the case be put that there be assets sufficient, which perhaps there may be material, though not in the other. See more hereof after in the title of Women covert, and Infants Executors.

See Co. lib. Int. 150. the executor being devisee for life, said, the other should have it after her death, & he entred and took admin. she dying intestate, yet held Assets in him. This M. 19. H. 7. Rot. 318. See li. Int. 321. One gave the third part of his goods to A, with whō the exec. accounted for the amount, & A sued for that sum in debt, but no judgment apō demurrer. Tr. 37. E. in ba. reg. Where bequest to the execu. himselfe.

As to the fourth point, first there may be an assent and election implyed, as well as expresse, for if in the devise or bequest the legatee be appointed to do some act as in respect of the legacy, and the Executor doth accept the performance thereof, this amounteth to an assent. So if the devise be to an Executor for the education of some children which he doth accordingly educate, this makes an election to have the thing by way of legacy, and not as Executor, as appeares by the case of *Paramour* and *Yardly*, *Plowd.* 543. So if an horse be bequeathed, and one offering to buy him of the Executor himself, he directeth him to goe and buy the horse of the legatee; or if the Executor himself offer money to the legatee for the horse, this implyeth an assent that it should be the legatees by the Will, and so was it held in the case between *Low* and *Carter*, where the devisee of a terme did grant it to the Executor

cutor, and this acceptance of a grant from him was held to imply the executors assent that it should be his to grant. But I see not well how that should be Law, which in the latter part of the Ld. *Dyer* is found, viz. where a term was devised to I S, and he was made executor, and after the death of the testator, entred and occupied the Lands a whole yeare without proving the will, that this was an election to have it as devisee and not as executor. For first, he had good right to the term as executor before probat, and so might clearely in that right have taken the profits, although it had not been devised or bequeathed to him, and that before any will proved. Secondly, he could not by right have it as legatee without assent of himself or some other as executor. Therefore this general acceptation can determine no election, as elsewhere is held. As for disassent or disablement to assent. As if the executor doe once declare his assent that the legatee shall have his legacy, he may then enter into it or take it, notwithstanding the executors countermand or revocation of his assent after. So on the other side, I think, if he fully & expressely deny that the legacy shall take effect,

Tr. 37. Eliz. If he by will bequeath it to I S, this is an election to have it as legatee.

he cannot after make a good aſſent thereunto, for that election once mad muſt ſtand peremptory, be it refuſal to aſſent, or aſſent. Yet *quære* of this, for that the refuſal to aſſent may be checked by ſentence or decree, in the Spiritual Court or Court of Equity, and ſo an aſſent be inforced. But if the power of aſſenting be legally loſt by the meanes aforeſaid, viz. diſabled, I ſee not how any legal intereſt can be transferred by that compelled aſſent, howſoever decreed. And what is ſaid of a legacy bequeathed to another, the ſame may be underſtood in caſe where the bequeſt is to the executor himſelf, and he makes his election to have it as legatee, or as Executor. But if where an Horſe is bequeathed to A, the Executor after the Teſtators death doth ride the horſe or uſe him in the Coach, or in the Plough; I doe not take this to be any ſuch diſagreement to the execution of the legacy, as that the Executor cannot after aſſent to the legatees having thereof, no more (though it be ſomewhat more) then where a drinking-cup is bequeathed, and the Executor after the teſtators death doth uſe it to drink in: nay, if a leaſe of land be bequeathed to *A.* and

So if the executor take a new leaſe, his aſſent is void. Tr 37. El. i Carters caſe. 19. El. D. 359.

and the Executor continueth the depaſturing of the Teſtators cattel therein, yet is not this any diſagreement to the execution of the legacy: but if this leaſeland were let out by the teſtator from year to year, & the executor diſchargeth the tenant, and taketh it into his hands at the years end, this I conceive to be a diſ-aſſent to the legacy, and ſo alſo perhaps may his taking or diſtraining for any rent thereupon due after the teſtators death; yet am I not reſolute that the diſaſſent is ſo peremptory & unchangeable, as the aſſent, remembring the caſe in K. *Henry* the eight his time, where a term being granted by a leſſee conditionally, ſo as the aſſent of the leſſor could be had by ſuch a day, though the leſſors aſſent were at one time denied, yet might it be yeilded at another, ſo as it were at any time before the day: But yet there it was held, that if no time of aſſent were limited, then one expreſſe denial or refuſal would be peremptory, ſo as the refuſal were expreſſed to the party to whom the aſſent was to be given; otherwiſe, if it were but in ſpeech to or among ſtrangers. This and the former caſe, 19. *Eliz.* give the beſt light to this point that

14 H 8. 23.

Dy. 359. After choice once made, no variation.

I remember. Now for disablement to assent, it was held in the fore-mentioned case of *Low* and *Carter*, that where a term is bequeathed to A, and after the Testators death the Executor takes a new lease of the same land for more years in possession, or to begin presently; now by this was the term left by the Testator surrendred and drowned, so as it could not passe to A by the Executors assent after.

As to the fifth point, viz. in what manner a lease for yeares or other chattel real may be bequeathed to one for a time, with remainder to another; it hath been heretofore much doubted, when a lease for yeares was bequeathed to one for life, or for so many yeares as he should live, whether the limiting of a remainder thereof after his decease were of any validity in Law or not? and this doubt had this ground; any state for life in the judgment of Law is greater than any term for years: therefore when a termer hath by his will given his term, or his house or land, which he so holdeth for years to one for life, or for so many years as he shall live; this testator and devisor hath not in the judgment of the

the Law any eſtate remaining in him; and therefore it was thought very hard for him to give or limit a remainder to another: But after many arguings and debatings, it was in the late Queens time reſolved, that ſuch a remainder was good, and that if the firſt deviſee died before the term expired, that then he to whom the remainder was limited, might enter and enjoy the reſidue of the term: As for the giving of part of the years to one, and the reſidue to the other; viz. If the terme being twenty years, the Leſſee bequeathed ten thereof to his wife, and the remainder to his daughter; Of this no doubt ever was, but that it was good, for that after the firſt ſtate limited, there remained a further term, viz. ten years more in the deviſor, whereof he had power to diſpoſe; whereas in the other Caſe, after the terme limited to one for life, there remained but a poſſibility that this life ſhould not take up the whole term. But now put we the caſe a third way, viz. that the termor deviſeth or bequeatheth the thing in leaſe to one child in taile, with remainder to another, and dyeth, and the firſt entreth and dyeth without iſſue; now

Plow. Com. 520. & 542.

whether ſhall the next in remainder, or the Executor of him ſo dying, have the term reſidue? And this caſe came in queſtion and was adjudged about themiddle of King *John* his reigne in the Exchequer: for there Maſter *Hamond* holding by leaſe for years from the Crowne, the Mannor of Akers in Kent, deviſed the ſame by his will to *Alexander Hamond*, his eldeſt Son, and the heirs males of his body, with remainder to *Ralfe Hamond*, another Son, in like manner, and the like remainder to *Thomas Hamond*, and made the ſaid *Alexander* Executor, who after his fathers deceaſe elected to take as legatee, and after *Ralfe Hamond* dyed leaving iſſue male, and making his wife executrix; *Alex.* not having iſſue male, granted the whole term by deed to B. & C, for the behoof of himſelf and his wife during their lives, and after to the uſe of his youngeſt daughter whom Sir *Robert Lewkenor* married; then *Alexander* dying without iſſue male, the wife, and Executrix of *Ralfe Hamond* entred claiming the term, and being kept out, ſealed a Leaſe, whereupon an *Eject. firmæ* was brought and a Jury appearing at the Barre in the Exchequer, found a ſpecial verdict

Both Alexander and Ralfe were executor; but that makes no difference.

ſt in effect *Vt ſupra*. And in argument
f this Caſe, firſt the maine queſtion was
hether this Caſe were all one in Law
ith the former, where a term was devi-
ed to one for life, with remainder over,
as by the death of *Alexander Hamond*
ithout iſſue male, the term ſhould goe
o the next in remainder, as in the other
Caſe, by the death of the deviſee for life
ying within the terme, it ſhould doe.
And on the plantiffs part it was urged
o be all one, ſo that by vertue of the
bequeſts *ſupra*, *Alexander* had an eſtate
o him, and his executors only, ſo long
s there ſhould be heirs males of his bo-
ly; and he dying without ſuch iſſue,
he term remained to the Executors of
Ralfe, who had the remainder in like
manner, & left iſſue male which ſtil lived,
nd ſo that ſtate of *Ralfe* yet had conti-
nuance. For it was admitted by the coun-
el on that ſide, that the term could not
goe to the iſſue male of *Ralfe*, according
to the words and intent of the will, ſince
it was impoſſible to make a term to de-
ſcend without an act of Parliament. This
therefore they ſaid the Law ſhould work,
which was neareſt to the intent, viz.
that after *Alexanders* death it ſhould

goe

goe first to his Executors, and assigne so long as issue male of his body doe continue, and for want of such issue, then to *Ralfe* his Executors and assignes, so long as his issue male should last; and therefore in this case the issue male of *Alexander* failing, the Executor of *Ralfe* whose issue male faileth not, should injoy the terme, and so judgment ought to be given for the plantiffe, being Lessee of that Executor: on the other side it was said by the defendants Counsel, that this case differeth much from the other case, where the term or Land held by Lease, is given but for life to the first with remainder to another; which case, as having been often resolved, was clearely admitted to be good Law; for in that case the intent of the Testator might, and did take effect. But in this case, if the Land should goe to the Executors and assignes of *Ralfe Hammon*, it must goe against the intent of the Testator, whose minde and will was, as it appeares by his word, that it should goe only to the issue male of one Son after another, and not to any Executors. Now then, since this intent was so contrary to the rules of Law, that it could not take effect, there-

efore it muſt be void, and ſo all the
ds of heires Male ſtanding void, the
ll is to be conſtrued as a ſole, and ab-
ute gift, and bequeſt to the ſaid *Alex.*
l conſequently the terme muſt goe to
Executors, and aſſignes. And for
s point reſemblance was made to a
ſe reſolved in the Kings Bench, where
Leaſe was made by indenture to A *Ha-*
d. to A B, and C for their lives: now
ecauſe B and C could take nothing, it
s reſolved that A ſhould not have it
r their lives, but for his owne only.
his Caſe was ſaid to come very cloſe in
aſon to the Caſe in queſtion; for as
re the intent of the Leaſe was that B
d C ſhould be eſtated for their lives,
d ſince that could not be, therefore
e naming of them ſhould be utterly
id, and as if they had not at all been
med; and their lives ſhall not ſtand
a meaſure for the eſtate of A. So in
e other Caſe the intent of the Will, be-
g that the Leaſe, or Land Leaſed ſhould
oe to the heirs Males of the body, firſt,
of *Alexander*, and after of *Ralph*; ſince
his cannot be, therefore the words, and
ame of heirs males ſhould ſtand for a
eere blanck and cypher, and not to
mea-

Windſmore and Holford vel Holbord in 28. & 29. Eli. argued; and Tr. 29. El. adjudg.

meaſure out any ſtate to the ſaid *Alex.* *Ralf*, and their Executors and aſſigns. Alſo it was ſaid on the defendants part that an eſtate for life in the judgment of Law is of ſo ſhort, and uncertaine continuance, that if A make a Leaſe to B for his life, and after makes a Leaſe of the ſame Land to C for years, now ſhall not this latter Leaſe be void abſolutely, for any part of the term, but ſhall ſtand in expectance of the death of B. and as ſoon as he dyeth, ſhall take effect immediately: whereas if the Leaſe to B had beene for ten yeares, or any like term, then the Leaſe to C ſhould have been void for ſo many years of his term: thus it appeares that a ſtate for life is very momentary in the judgment of Law, and not reputed of any certain continuance ſo much as for a day. But it is otherwiſe of an eſtate taile, ſo as if A having given Land to B in tayle, doth after (without indenture, which makes an Eſtopel) make a Leaſe to C for 21 years, and then B dyeth without iſſue during the term, yet ſhall not the Leaſe take effect, becauſe it was utterly void at the firſt making. For an eſtate tayle being a ſtate of inheritance, may in the intend-

ment

nt, and judgment of Law have con-
nance for ever, as appeares both by
Caſe of *Adams* and *Lambert*, where
held within the Statute of Chante-
, which ſpeakes of gifts to have con-
nance for ever. Therefore a reverſion
on an eſtate tayle is no aſſets, nor gi-
h cauſe of receipt, otherwiſe in all theſe
ſes it is touching a reverſion expectant
on a ſtate for life. Againe it was ſaid
the defendants councel that an eſtate
y be limited to A and his heires du-
g the life of B, with remainder to C,
in *Chudlies* Caſe was reſolved: but if
nd be given to A and his heirs, ſo long
B ſhall have heirs of his body or heirs
les with remainder over to C, this
mainder is utterly void. So as there
in the judgment of Law a great diffe-
nce between the largeneſſe and con-
nuance of an eſtate tayle, and of an
ate for life. And if (which is worth
e obſerving) a fee ſimple cannot afford
remainder to be drawn out of it after
ch a gift to one and his heirs, during
e continuance of an eſtate tayle, or of
e meaſure thereof; much leſſe can a
rm yeild ſuch large thongs to be cut
t of it, as a remainder after an
eſtate

eſtate to one ſo long as he ſhall ha
heirs of his body, or heires Males, whic
is all one. And in this caſe the remai
28.H.8. Dy. fo.7. der was held void by *Baldwin* and *Shelly*
though *Engleſield* were of contrary op
nion, as the Lord *Dyer* ſheweth. Fur
ther it was ſaid, that if ſuch a convey
ance by will ſhould ſtand good, it wou
raiſe a perpetuity not to be cut off by a
ny recovery.

But whereas the caſe of *Hammon* hath
been related before, (ſo by way of ad
mittance it was argued as a gift, and be
queſt to *Alex. Hammon*, and the hein
males of his body, with remainder in like
manner to *Ralph.*) The truth of the
caſe was, that the words of the Will
were only to *Alexander*, and his hein
Males (not ſpeaking of his body) and
ſo to *Ralph*; which, as was urged by the
defendants counſel, made the Caſe ſtron
ger againſt the plantiffes: for admit
that the former way, *Alexander* ſhould
have had but a ſtate determinable upon
the continuance of his iſſue Males, yet
here not ſo. Since the reaſon why in wils,
ſuch a deviſe being made, the Law ſhould
ſupply the words (of the body) is only
to make an eſtate tayle to the iſſues Male

cording to the Teſtators intent. Now this caſe of a term for years ſo bequeathed, no eſtate tayle could poſſibly be, though theſe words had been in the Will; and therefore the motive to the Law fayling, no ſuch ſupply will be made by the Law, ſince it would be to no purpoſe: conſequently, here was neither eſtate taile, nor iſſues or heirs Males of the body, on whoſe continuance this eſtate of *Alexander* ſhould be determinable. Therefore it was an abſolute, and total bequeſt of the term to *Alexander* for ever, viz. ſo long as the terme ſhould continue: for as a bequeſt to one for ever is aſmuch as a bequeſt to him, and his heirs; ſo a bequeſt to one and his heirs, is as much as if it had been to him for ever.

And this Caſe after ſix arguments on each ſide at the Barre (if I much miſtake not) was upon argument by the Barons adjudged for the defendant, by the Lord chief Baron *Tanfeild*, and Mr. Baron *Bromley*, Mr. Baron *Denham*, (who only heard, as I take it, one argument on each ſide, made of purpoſe in reſpect of his coming into his place after the former arguments) being of the

the contrary opinion : and the judg-ment proceeded upon the point formerly touched, that as this case was, the state of *Alexander* did not end by his death, and remaine to the Executors of *Ralph*. Other points were stirred which will be touched upon in other divisions after in this Chapter. It will be observed that I doe more fully expresse reasons, and points inforced on the defendants part, then on the plantiffs, wherefore let these two reasons be accepted. First, that I better could relate that then the other, being the first who argued for the defendant, and hearing little of that which was by others sayd on either side after, nor hearing the Courts, *Nec ad hoc conductus, nec pedibus fortis.* Secondly, the labour did lye on the defendants part, to prove that this Case differed from the common case of devise to one for life, with remainder to another.

¶ We are now come to the sixth point, viz. That where House, or Land held by Lease, or the profits thereof, or the Lease or term it self, which in a Will makes no difference, is bequeathed to A for life, or for some part of the term with the remainder to B, and the Executor assent

eth that A ſhall enjoy his bequeſt, ether this ſhall enure to B alſo, ſince hout the Executors aſſent, no legacy take effect. And it hath been reſol- that this aſſent ſhall be effectual, as ll to all the remainders as to the firſt ate, and ſo according to former reſo- ions, it was admitted in *Hamonds* Caſe, at *Alexander* his aſſent to take as lega- ſufficed (if the bequeſt had been od) for the remainders to *Ralph*, and bers. And the reaſon of this doubtleſſe becauſe here the particular eſtate, and remainder are all but one eſtate in w; they make but one degree in a Writ Entry, nor ſhall have but one year & day to enter for mortmaine; And an ar- nement to the grantee of a rent or re- ſion for life with remainder over doth ure alſo to the remainder, which be- aſſent hath much affinity to that of Executor, each tending to perfect grant of another man. Now then hereas it was urged in *Hamonds* Caſe, at the ſtate limited to *Ralf*, ſhould take ect not as a remainder, but as a new e- ate to commence futurely, viz. when *A-* ſhould be dead without iſſue male: if ſhould be admitted to be ſo, then could

Plow. 545. 6 Co. lib. 10. f. 47.

not the assent of the first state to *Alexander* have enured to this, since to R in remainder it worketh as being one estate with the first, which reason must fail the other way. This difference between a remainder, and new estate future, brings to my minde the case of a rent by way of new Creation granted by C, out of Land to A for life, or in tayle, with remainder to B. In like manner it hath probably been held, although this limitation to B cannot be good by way of remainder, because C had no estate in the rent remaining with him when he made the grant to A, yet should it be good by way of new grant, and creation to commence futurely. But this doubtlesse cannot so be but with a difference, for if the grant were by indenture between C on the one part, and A only on the other part, now B being no party to the deed can take nothing by it except by way of remainder; but if he were party to the indenture, or if the grant were by deed poll to which all men are a like parties, then it happily may enure as a future grant to B. This is not impertinent.

Now as the Executors assent to one cannot enure to another, though of the same

e thing, except by way of remain-
; ſo neither can it any way where the
gs are not the ſame, except in very
cial caſes; as if a termer bequeath a
t to A, and the Land it ſelfe to B, the
cutors aſſent that A ſhould have the
t, is no aſſent that B ſhould have the
d: yet I thinke the aſſent that B
uld have the land, doth imply the aſ-
t that A ſhould have the rent. 1.
t that the reſtraint impoſed by the
w, againſt the paſſing of a chattel by
will without the Executors aſſent, be-
out of reſpect to the payment of the
tators debts: now if the Land ſhall
le to B, it is no more available to the
tators debts that it paſſe diſcharged
the rent, then charged. 2. Since the
and bequeſt was of the Land charged
h the rent, therefore if this bequeſt
ll take effect, it ſhall carry the Land
ording to the Teſtators intent, viz.
h this charge upon it: for what elſe
h the Executor in this, but aſſent that
will of the Teſtator herein doth ſtand
take effect, and conſequently B
ll take the term according to the will,
not in any different or contrary
nner.

Plow. Com. 521. In Bret & Rigdens caſe. So of common or other profit

Next we are to consider of the ma
of assents by executors, which hath
affinity with the fourth point. But
we shall consider only of assents con
onal. Now to this purpose we wil cas
eyes upon two sorts of conditions,
precedent and subsequent. As for the
mer, an Executor may to a legatee a
lutely give assent upon a condition
cedent, as thus. I am content, that if
can get and bring in to me such a bo
wherein the testator stood bound unt
S, that then you enter upon the term,
take the corne or cattel to you beq
thed. So of other like conditions wh
may precede the assent, as if you can
the assent of my Executor, or if you
pay the arrerages of rent to the le
behind at the testators death, or if
wil pay the wages already due to the se
vants attending about the cattel or co
to you bequeathed. In this case, if the co
dition be not performed, there is no
sent, & therefore the conditioning in
manner is good. But if it be on a condi
on subsequent, as thus, I do agree, that
shall have the thing bequeathed to
provided that you shall pay so much
ly to me, or to such a creditor of the te

; now the legatee entring into or ta-
g the thing bequeathed, ſhall not loſe
gain by failing to performe the condi-
n afterwards, for the executor by his
ent cannot make that legacy conditi-
al which the teſtator gave abſolutely,
more then he can make the bequeſt to
abſolute which the teſtator gave con-
ionally, except by a releaſe made of
condition. As in other things, ſo in
is the executors aſſent is like to the at-
rnment of a leſſee, which cannot be up-
a condition ſubſequent, where the
ant is abſolute or without condition,
ough yet he may to his atturnement
rfix a condition precedent.

In the eighth place we are touching the
queſt of leaſes or chattels real, to con-
der what manner of intereſt one to
hom a remainder of a term after the
eath of another is limited, hath, & whe-
her he may grant the ſame or diſpoſe
hereof during the life of the firſt. And as
o that it is cleare that he hath but a poſ-
ibility of remainder, for that poſſibly
he whole term may be ſpent in the life
of the firſt, to whom during his or her
ife it is bequeathed, now a meere poſ-
ibility is not grantable. Therefore was

39 Eli. Fulſes caſe.

it reſolved in the late Queenes time where he in remainder granted or ſold his ſtate or intereſt to another during the time of the firſt, that this grant was vterly void, becauſe a poſſibilty cannot be granted; but whereas ſome opinion in that caſe was delivered that this poſſibility could not be releaſed, no more then granted, it hath ſince been reſolved that he in the remainder by his deed of grant or releaſe of the deviſee for life, may make his eſtate, which before was determinable by his death, to be now abſolute, ſo as it ſhall continue to his executors, adminiſtrators, and aſſignes after his death during the whole term. It may be that what was conceived in the ſaid caſe of *Fulſey*, negatively of the validity of a releaſe by him in the remainder, might be meant or perhaps expreſſed of a releaſe to him in the reverſion; but ſurely (me thinks) though he could not ſurrender; yet his releaſe or defeaſance to him in reverſion or remainder having the freehold or inheritance, ſhould diſſolve or deſtroy the term reſidue after the death of the deviſee for life, ſo as there the freehold ſhould be diſchargd thereof. But *Qua-*

Lampets caſe. Co. li. 10. fo. 48.

re,

for I have not known this in queſtion. As for the other point of *Eulſes* caſe, it was in the ſaid latter caſe of *Lampet* confirmed and admitted for good Law, viz. that this poſſibility of remainder could not be aliened nor conveyed to a ſtranger.

Now we are come to the ninth Point, viz. to examine whether any act of the deviſee for life can fruſtrate or defeat him in the remainder of the term, and whether by the act of God, viz. the death of him in the remainder before the firſt deviſee for life, ſhall defeat it. As to the firſt, it hath divers times been reſolved, that no grant made by the firſt man, can cut off or defeat the ſecond, though formerly it were held otherwiſe; but according to the late reſolution was it alſo held or admitted by all in the ſaid caſe of *Hamond*, where was ſuch a grant. And as this cannot be done by direct grant or alienation, no more can it by an indirect, or implyed, as by taking of a new leaſe, which is a ſurrender in Law of the old leaſe, no more than by an expreſſe ſurrender. Nor doubtleſſe by outlawry, whereby the term of the firſt deviſee is ſetled in the Crown. But

9. Point.

Plowd. 520. *Welcden & Elkington*, 10 Eliz. D. 277. 19. Eli. D. 359. Cor. 8. El. D. 253. & 23. H. 8. Br. chauns. 23.

if we put the case further, of waste committed by the tenant for life, or breach of condition by not payment of the rent, or otherwise; these for the whole in the latter case, and for the part wasted in the former, doe so destroy the lease, and put the reversion in *Statu quo prius*, as that all remainders must needs faile: so of a feoffement or other like forfeiture by fine. As for the death of him in remainder, it was urged in the case of *Hamond*, that since it was but a meere possibility, if it could not take effect, and become an estate in the life of him to whom it was limited, it could not settle in his Executor; and to that purpose were cited the case of the Rector of *Chedington*, and more expresly as resolved in the point, the case of *Price* and *Atmore*. But the Court resolved (and found former resolutions in other Courts that way) that the death of him in remainder did not hinder, but that it may settle as well in his executors upon the death of the devisee, as it should have done in himself, if he had overlived the first devisee for life. If the lessor enter and levie a fine, and the devisee for life enters not, nor claimes in five years, he in the

welchden & Milk. ubi supra. But there the point was never questioned, though such death was there.

the remainder may enter, as having a right futurely accrued.

In the laſt place we intermedled only with leaſes bequeathed, wherein yet is to be underſtood, that what thereof is ſpoken, is to be extended to, and underſtood of all other chattels real, as wardſhip of body & lands, eſtates by extent upon ſtatutes or judgments, terms otherwiſe than by leaſe, in fairs, markets, rents, annuities, commons, advowſons, and other profits; yea, one ſingle next avoidance of a church. Now we come to conſider of bequeſts perſonal, principally, if not only, viz. how ſuch may be forfeited, loſt, or revoked. Firſt then, we will conſider of the acts of the legatee; ſecondly, of the acts of God; thirdly, of the acts of the teſtator. The legatee, as from the Civilians I learne, may forfeit his legacy by his miſ-carriage towards the Will: as if he uſe meanes to have it concealed and kept from being known, and conſequently proved. So if he accuſe it of falſitie. So againe, if he deface or deſtroy the Will. Alſo if being by the Will appointed to be tutor or educator of a child, he refuſeth ſo to be; ſo ſaith Maſter *Swinborne*: but *Silveſter Prierius* ſeemes

10. Point.

Of forfeiture, revocation and other loſſe of legacie.

Swinb. de teſtam. 352, 353. Except as tutor or guardian he accuſe it.

Sum. Silv. 284. seems to me opposite in that where he saith, *Si legatum fuerit aliquid ea conditione ut facias aliquid, tale legatum non est conditionale, sed modale*; so as he taketh away the force of a condition from words conditional, whereas the other without words conditional raiseth a condition implyed. Lastly, if the legatee presume too farre upon the strength of the bequest to him, so as he taketh the thing bequeathed without the consent of the Executor; thus also doth he forfeit his legacie; saith Master *Swinborne*, De Testam. 252. unlesse the Testator did will and appoint he should so doe. The falling into enmity with the Testator, will be considered of more fitly, as I take it, among the acts of the Testator. In the next place let us see what acts of God shall cause a legacy not to take effect; first thus, If the legatee dye before the Testator, this legacy is lost, and his Executor shall not have it: So also saith Master De Testam. 255. *Swinborne*, if it be appointed to be paid after the death of the Executor, and the Legatee dyeth before the Executor, it is lost; and so also if he dye before the condition performed, saith he; Let us come now to time of payment, and death

before

before it. If there be a day certaine limited for payment, and the Legatee dye before that day, his Executor shall have the Legacy; contrariwise, if the payment were limited to be made when the Legatee should be married: but if it were only expressed to be towards the marriage of the Legatee, and she dye before marriage, her Executor shall have it, saith *Swinborne*. Now put the case that a legacy is bequeathed to B, to be paid when he shall be five and twenty years old, and B dyeth before that age, it shall now be payd to the Executor, and that presently without staying till B should have been of that age, saith *Prior*. Nay, saith *Swinborne*, if the words of the Will be so, viz. when he shall come to such an age, then if he dye before, his executors shall not have it at all: but if the bequest be general, and further it is added in the Will, that the Testator would have that legacy paid the Legatee at such an age there, though he dye before such age, yet his executors shall have the summe bequeathed. The difference may seem very nice, yet happily it wants not some probable colour of reason. Now lastly let us come

Vide Bro. Devise 27. & 45. there were divers daies of payment, & the devisee died before the last, his exec. shall have it 14. vel. 24. H. 8. 36. H. 8. & 3. El. Dy. 59. See this difference.

Sum. Silv. 283. According hereto vide Dy. ubi supra, per majorem opinionem Justiciar.

Acts of the Testator.

to

to the teſtators own act, who clearely hath power to revoke or countermand any legacy, though he revoke not the reſt of the Will; and here firſt of revocation preſumed. If there fall out *Graves inimicitiæ inter legantem & legatarium, legatũ caducũ efficitur*, ſaith the Summiſt; *Sed non propter leves*, ſaith he, *etſi graves, ſi tamen redeant ad amicitiam, reintegratur legatum*; that is by grievous enmity after ariſing, and never reconciled between the teſtator and legatee, the legacy is diſſolved; otherwiſe of a light breach, or falling out, though it continue until the death of the teſtator. This I conceive to be rather fit for this place, as an act of the teſtator, than to be reckoned or regiſtred amongſt the acts or forfeitures of the legatee, for that it is not by the Summiſt made material, or any point of difference, whether the legatee gave juſt cauſe of offence, or that the teſtator unjuſtly conceived diſpleaſure, and ſo grew into cauſeleſſe enmity. Therefore alſo doe I hold it of the nature of a revocation implyed or preſumed, for that although no revocation be made, yet ſince the teſtator hath ceaſed to beare good will to the legatee, he cannot be intended to will him good, nor

Sum. Silv. 185.

nor consequently to be of the same mind, touching the benefitting of him, as he was when he made his Will: yet here again it is worth the consideration, whether the circumstance following may not make a difference in the case thus, That where the testator dyeth shortly after the breach and enmity grown, and before he come to the place where his Will is, or at least to opportunity of perusing and reforming the same: There this very alteration of affection should make an alteration in the Will, and a revocation of the amicable bequest. But where he living a good space after, and coming to the place where his Will was, and specially if he doe againe peruse it, and yet doth not crosse nor expunge that bequest, here it may be presumed that either his enmity ceased, or that so farre as to continue this bequest, the charity or other motives inducing him to make it, stood unvanished and not extinguished by this breach of former amity. For as the continuance of time and opportunity after the making of a verbal or uncupative Will, without reducing it to writing, and causing it to be attested by witnesses, though the Testator live divers yeares after,

after, doth strongly argue his intent not to continue, that what was done in an extremity should stand as his will: so on the contrary, the permitting of a bequest expressed in a written Will, to continue without any crossing, blotting, or defacing, may argue against contrary presumption, the Testators minde, that it should continue as part of his Will. But now let us consider of more expresse revocation, and to that purpose will I relate a late decree in the Chancery, made by the Lord Keeper, according to the opinion of the Master of the Rolls, three Judges, and two Doctors, Masters of the Court; Between *Robert Eyre* and *William Eyre* complainants, and *Hester* late wife of *Christopher Eyre* their brother, and now wife of Sir *Francis Wortley*, Defendant; Thus was the case; The said *Christopher Eyre*, 15. *Jacobi*, by his last Will and Testament giveth and bequeatheth to the said *Robert Eyre*, his brother, an hundred pounds, and to the said *William*, his brother, a thousand pounds, and gives to the said *Hester* his wife all the residue of his estate, and makes and ordaines the said *Hester* his sole and only executrix, saving for the per-

performance of his Will, ordaines *Robert Eyre* and *William Eyre*, his ſaid brothers, whom he intreats to joyne as Executors in truſt with his wife, for the better performance of this his laſt Will. Afterwards, Jan. 5. 1624. being ſick of the ſickneſſe whereof he dyed, he was moved by Maſter *Damport*, and Maſter *Stone*, to ſettle his eſtate; to which motion he yeilded, and Maſter *Stone*, and Maſter *Damport* did demand of the ſaid *Chriſtopher*, what friend he thought fitteſt to be his Executor, and to whom he would commit the care of diſcharging his funerals, and performing his Will, whether he truſted any perſon more than his wife, to be his Executor? To whom he anſwered, That his wife was the fitteſt perſon for that purpoſe, and therefore ſhould be his ſole executrix: and then the Teſtator was moved by Mr. *Stone* to give and bequeath legacies to his father, to his brethren, and to his kindred; whereupon he anſwered he would give or leave them nothing: and being further put in minde to remember his friends and others, gave and bequeathed to *Lionel Atwood*, his God-child, twenty or thirty ſhillings; and being there-

thereupon moved by his wife to give his ſaid God-ſon more, or a greater legacy, or the like in effect; ſaid, thou knoweſt not what thou doeſt, doe not wrong thy ſelfe, twenty ſhillings, or thirty ſhillings is money in a poore bodies purſe, or the like in effect; and the reſt, he left them to his wives diſcretion or diſpoſition, and the ſaid Teſtator did ſpeake the words aforeſaid, or the like in effect, *Animo teſtandi & ultimam voluntatem declarandi*, as the witneſſes then preſent did conceive.

This Will was proved by the oath of the ſaid *Hefter*, and this *Codicell* being pleaded as a revocation of the ſaid bequeſts: The ſaid Maſter of the Rolls, Judges, and Doctors were by the Lord Keeper, and the Order of the Court deſired to reduce the matter upon the Will and *Codicell* into a caſe, and to certifie their opinions, whether the ſaid *Codicell* were a revocation of the legacies given to the plantiffes or not. And they, after counſel heard at ſeveral times, viz. both common Lawyers, and Civilians, and many hours ſpent in conference together, did finally reſolve with one unanimous conſent, that the legacies to the plantiffes given

Ord. 27. Jun. 2. 2. Caroli regis.

ven were not by the said *Codicell* re-
oked, and ſo certified under their hands,
pon reading whereof *Novemb.* 25. de-
ree being reſolved to be made, if cauſe
ere not ſhewen to the contrary, *No-*
mb. 27. on which day the defendants
Councel before the Lord Keeper in the
eſence of the Maſter of the Rolls, and
he ſaid three Judges, and Sir *John Hey-*
ard, alledging what they could in ſtay
of the ſaid decree: It was by a general
concurrence of opinion decreed, that the
legacies given to the ſaid plantiffs, ſhould
e to them paid on our Lady Even, with
enty Nobles in the hundred for the de-
inment thereof.

This caſe I thought fit to relate ſome-
hat at large, becauſe it pitcheth upon
he point of revocation without plaine,
ll, and expreſſe terms. And ſurely as
Wils are to be made out of diſpoſing me-
ories, and underſtandings, ſo alſo with
liberate, & adviſed judgments; & there-
re by like reaſon not to be counter-
anded, or revoked by ſick, or ſleight ex-
teſſions. And this ſeems to me very a-
reeable with the rule, and reaſon of the
omón law. For as reaſon it ſelf doth di-
ate, that *Nihil tam conſentaneũ eſt æqui-*

tati naturali, quam unumquodque diſſolvi eodem modo quo conficitur; So hath the common Law of *England*, in my underſtanding, reſolved; as for the purpoſe, if the King preſent a Clerke to a Church, and he is thereupon admitted, and inſtituted thereunto. Now yet before induction may this be revoked as a Will may. Yet if the King ſhall after, and before induction preſent another man to this Church without an expreſſe repeale or countermand of the former preſentation, it ſhall not hereby be revoked. So if Lands were conveyed to certaine uſes, with a clauſe or power of revocation; the ſale of the ſame to another did not revoke the former. But if a ſtate were meerely at will, then the conveyance to another by the common Law, amounted to a revocation. Therefore was the Statute made *tempore Henrici* 8. to redreſſe this, viz. that where the King had granted lands, or other things to one during his pleaſure, this ſhould not be revoked by a grant to another without recital of the former, and declaration that the King had determined his pleaſure.

To help this was the ſtat. made 27. El. cap. 4.

6 H. 8. ca. 9.

11. *Point.* Being now to conſider of relation in the

the Executors aſſent, it is meet that ſince theſe diſcourſes are principally intended, for thoſe who are not grounded Students in, or profeſſors of the Law, that we ſhew what we meane by relation, or what it is in Law. Thus therefore be it conceived; that relation is a kind of fiction in Law, making a thing done at one time to be accepted, and repuld, or to have its operation, as if it had been done at another time paſt. As for the purpoſe, A doth bargain, and ſell freehold lands to B, in *Auguſt* by indenture, which is not inrolled till *October* following, yet this hath ſuch relation to the date of the indenture, that if A after that, and before the inrolment, become bound in a Statute, or granted a rent charge, or made a Leaſe for years, or tooke a wife, or committed felony, yet ſhall none of theſe be of any force to charge or prejudice the ſtate of B, for that the Law adjudgeth him now owner by relation as from the time of the date: ſo, if a ſervant departing in *Auguſt*, for ſome great breach with his Maſter, doe kill his Maſter in *October*, this is in Law petty treaſon, as if he had continued ſervant when he did the fact, becauſe

it relates to the malice conceived when he was his ſervant. Now then having ſhewed that a term or other chattel real or perſonal, paſſeth not, nor is transferred in property to the deviſee until the aſſent of the executor be thereunto had; we now put the caſe that this aſſent is not had till a year, or ſome ſuch good ſpace after the teſtators death, & make our queſtion whether this ſhall have relation to the teſtators death, viz. to be in the laws account as if it had then been. Or perhaps to ſome purpoſes ſo to ſtand, and to others not ſo. That this is uſeful, and material to be known, be it thus ſhewed. One bequeatheth his term of tithes of an advowſon of an houſe or land by him firſt leaſed, to an under tenant for rent, and dyeth in *May*, the executor aſſenteth to the bequeſt in *October*, between which two times tithes be ſet out, the Church becometh void, rent groweth payable; now if this aſſent ſhall relate to the teſtators death, the deviſee ſhall have theſe, elſe not; the like caſes may be put of the brood of Cowes, Mares, and Ewes, fallen betweene the death of the teſtator, and the aſſent; ſo alſo of fleeces of ſheep ſhorne, &c.

Now

Now to come to the point, it is reported by the Lord *Cooke*, to have been held in the late Queenes time, that this aſſent ſhall, as betweene the Executor, and the legatee, have relation to the teſtators death; yet ſo that if the Executor before his aſſent to the deviſee of a leaſe, committed waſt, now the action of waſt ſhall be brought againſt the Executor, in the *Tenuit* for the waſt done before, and not againſt the deviſee in the *Tenet*.

Tr. 41. Eliz. Co. li. 5. f. 12. *B. Sanders* caſe. Vide Plow. cō of an action of treſpaſſe againſt a ſtranger for taking before aſſent. 280. b.

But put the caſe that the legatee, before the Executors aſſent, granted the terme to I S, now if to any purpoſe this aſſent ſhall have relation, it ſhall certainely ſo be to make good this grant, as making the legatee to be eſtated, and conſequently able to grant before the executors aſſent; yet do I not finde any opinion or reſolution in the Point, but finde it debated at the Bar in the late Queenes time, between *Puckering* and *Egerton*, in the caſe of adminiſtration granted to A after her grant of a free term, left by her inteſtate husband; but I finde no reſolution therein, nor perhaps wants there material difference betwixt that caſe, and the other:

P. 25. Eliz.

for there the deviſee had at leaſt an inception of title by gift of the owner, wanting only a circumſtance of aſſent to perfect it: but here this woman till adminiſtration had not ſo; unleſſe perhaps the Statute 21. of K. *Henry* the eighth, directing or enjoyning Ordinaries to grant adminiſtration, ſhall amount to a kind of title *ad rem*, though not yet *in re*. But to returne to the Point of aſſets; where a reverſion is granted by deed or fine, if the leſſee a good time after doe atturne, this ſhall have no relation to the time of the grant; So as for waſt committed or rent grown due between the grant and atturnment, the grantee can have no remedie. Therefore it is good for him who buyeth, or hath any thing of the gift of a legatee, to have the aſſent of the Executor, before the ſale or gift, well teſtified; or if the aſſent be not had till after, let him take a new gift, that he may not reſt in a doubtful caſe, for beſides the premiſes, that great legiſt, Sir *Edward Cooke*, when he was a practiſer (to Maſter *Stubbes* of *Norfolke*, for his fee) gave his opinion, as I have been confidently informed, that where a leſſee for yeares, being out lawed

48 E. 3. 15.

lawed, did grant his terme, and after reverſed the outlawry, this did not make good the grant by relation, it not being in the grantor at the time of his grant: and this hath much affinity with the principal point, for there if the relation help not, the grant is not good from the legatee.

Divers caſes of bequeſts, conſidered, and expounded.

IF a termor of an Houſe, bequeath his Houſe to B, without expreſſing how long he ſhould have it, he ſhall have the whole terme, and number of years. So of Land. 14 Eliz. Dy. 307. cont. in a grant. 31 Eliz.

Alſo by the name of the Houſe, the Orchards, Gardens, and Backſides doe paſſe: yea if the Houſe with the appurtenances be bequeathed, thereby the lands belonging to the Houſe, or uſed with it, doe paſſe, though yet they would not ſo doe, by ſuch words in any leaſe, deed, or grant; yet by ſome Civilians or Canoniſts, the Orchard belonging to an Houſe ſhall not paſſe by the onely gift of the Houſe, without ſome words, ſhewing the intent of the Teſtator ſo to Sum. Silv. 286.

be; or except one gate or door lead as well to the orchard, as to the house; but some other of them hold that it doth passe without any such help of circumstance, so as it be adjoyning to the house.

If a lessee for years give his term by his will to A, he shall have it without paying any rent, for the executors shall pay it for him, as I finde in the Summist, but against reason me thinks.

Ibid. ut sup. If one bequeath his indenture of lease, his whole state in that lease passeth. So if one bequeath his obligation or other specialty, the debt or duty it selfe shall goe to the legatee; and by the Canon Ibid. ut sup. or Civil Law the very action it selfe passeth, viz. as I conceive, ability to sue the debtor in his owne name; but in our Law it is otherwise, the suit must be in the executors name, for a debt or thing in action cannot be assigned except by or to the King; and only at the common Law is the debt recoverable; but the Spiritual Court may force the executor to sue or let his name be used in the suit for and by the legatee.

Yet 48. E. 3. 22. 15. It is admit. that such a devisee of all goods after debt paid, shall have a duty resting in account.

If one bequeath all his moveables, debts due to him are not bequeathed, nor corne, nor fruit growing on the ground,

ground, nor ſtone, nor timber prepared for building, as the Canoniſts and Civilians hold.

On the other ſide, if one bequeath the moiety of all his goods, the legatee ſhall have only the moiety of that which remaines after debts payed, for that only is to be accounted the teſtators which he hath *ultra æs alienum.*

By a bequeſt of all utenſils or houſholdſtuffe, plate nor jewels are not given. Qu. 36. H. 8 Dy. 59. Dy. Ibid. ſupra Sum. Silv. 286.

If one bequeath to his wife all her apparel, ſhe ſhall not have, as ſome Civilians ſay, her ornaments of gold or ſilver, by which is meant as I take it, chaines, jewels, bracelets, rings, &c. but others are of contrary opinion, except they be ſuch things as are not lawful for her to weare.

If a Bed be given by a will, *Venit ornamentum ejus*, ſaith the Civilian; that is, the furniture thereof paſſeth, viz. not only the bed, bedſteed, bedcloaths, but alſo the Curtaines and Valens, as I take it. But I think that by gift of a Coach by will, the Coach horſes paſſe not; yet perhaps the furniture of the Coach-horſes may paſſe as appurtenant to the Coach; for ſo I think they ſhall doe, rather then by bequeſt of the Coach horſes without the Coach. Ibid.

If

Ibid. If one bequeath to A meat, drink and cloathing, or *alimenta*, he shall have, saith the Civil Law, also lodging, habitation, and all things necessary for the maintenance of life, viz. as I take it, fire and washing, &c.

Ibid.b If one bequeath to his daughter tenne pounds a yeare for her apparelling, and she demandeth none in foure years, now shall she not after that time have the arrerages of this ten pounds by yeare for the time passed.

Ibid. If a man bequeath one of his horses or cowes, not naming which, to I S, he is to chuse which he will, so it be not the best of all, saith the Civil Law, and perhaps the mention of that exception growes out of respect to the hariot, which the Lord should have, or the mortuary which the Parson should have.

Ibid. A man bequeathed thirty pieces of twenty shillings to A, twenty to B, and ten to C, to be had in such a Cheft or Casket, and it is found after his death, that there be but thirty in all in that casket or box, now each shall be abated ratably, saith my Summist, so as A shall have fifteene, B ten, and C five; and this stands with good reason and justice, for so

ſo each hath a proportionable part. And it were reaſonable, that it were by Parliament eſtabliſhed for Law, that all both legatees and creditors ſhould be paid in like proportion, where the ſtate will not ſuffice for full payment of each, rather then that an Executor ſhould have power to pay one all, and another nothing: yet if the teſtator left ſufficient to make good all thoſe ſixty pieces bequeathed, *Quære*, If that which is wanting in the caſket ſhall not be ſupplied and made up, for if the caſes following found with the ſame Author be good Law, it ſhould ſeem ſo to be.

If one, ſaith he, bequeatheth to I S, that which is another mans, and whereto the Teſtator hath no right, then ought his Executor to buy it, and give it to the legatee, or elſe ſatisfie him to the full value, and this not only by the Civill, but alſo by the Cannon Law, and in *foro conſcientiæ*, ſaith my author. Sum. Silv. 286.

Againe, if A bequeath to B, ſuch an horſe by name, and after ſell away that horſe, and dyeth, now is his Executor bound to anſwer the value thereof to B; and if the teſtator after his ſale of that horſe had bought another, and called him Ibid. 287.

him by the ſame name as the firſt, now ſhall this latter horſe paſſe to B, ſaith the booke, except it can be proved that the teſtator ſold the former horſe of purpoſe to revoke his will touching that bequeſt.

Ibid. 286. So againe find I, that if one having but a moiety or one halfe of Green cloſe, or of a ſtack of corn, or other chattel, doth give the whole, ſo as the words be apparent to reach to more then his moiety, then muſt the execut. buy out the others part for the legatee, or give him the value; but if the words be but general, ſo as they may be reaſonably ſatisfied with the teſtators part, no ſupply ſhall be made. So alſo if one having goods in pledge, bequeath them, it ſhall be conſtrued to extend no further than his right.

Ibid. 284. a. A bequeſt is made of an hundred pound to be paid at a future time, viz. divers years after the teſtators death; a queſtion is made by the Summiſt, whether the profit of the money in the meane time, ſhall goe to the legatee or the executor; and he reſolves with this difference, if the day were given in favour of the legatee being an infant, who could not ſafely receive it any ſooner, then he ſhall have the profit; but if the reſpite of payment

ment were in favour of the executor, then ſhall the legatee have but the bare ſum without any addition of meane profits.

If one bequeath all his term or goods to his executor for payment of his debts, or debts and legacies, it is a void bequeſt, becauſe it is no more than the Law would ſay, if he had ſaid nothing. So if it be generally to performe his will. 15 Eliz. Dy. 331. Plow. Com. 545.b.

If one ſeized in fee-ſimple of land, bequeath it to his executor to pay debts, the executor hath no ſtate of free-hold; for if he ſhould, then it muſt be either for life, which might end by his quick death before debts payed: or in fee-ſimple, which would carry away the land for ever from the heire, where perhaps a few yeares profits might ſuffice to ſatisfie the debts; yea, then by the death of the executor the land ſhould deſcend to his heire, and not goe to his executor, who would be executor of the firſt teſtator. Co. lib. 8. 96.a.

If one give or grant all his goods, having leaſes for years as well as moveables, the leaſes ſhall not paſſe, as was held in the time of King *Edward* the ſixth. And ſo alſo was it admitted in *Portmans* caſe, for the word *Bona* comprehendeth only moveables by the better opinion there. By deed or word in life. 4 E 6. Bro. Done, &c. 43. Tr. 37. El. in ba. reg. Portman. ver. Simmes or Willis, divers times argued.

But

But the point in that caſe was pertinent to this place, viz. a bequeſt in a Will of all the Teſtators goods, and whether thereby a leaſe for yeares paſſeth or not, was divers times debated, but not reſolved, the Judges differing in opinion in that point; but in another point which made an end of the caſe, all agreed. Yet the better opinion was, as I find in my report, that a leaſe would paſſe by ſuch words in a Will, though not in a deed or grant by word otherwiſe made, for the legacies are demandable in the Spiritual Court, where *Bona & catalla* are taken for all one. See alſo the ſtat. of *Marlbr.* giving an action to the ſucceſſor, *Ad repetenda bona prædeceſſ.* Yet an *eject. cuſtod.* hath been maintained thereupon: ſo alſo upon the ſtatute for Executors, *de bonis aſportatis in vita teſtator.* hath it been reſolved, and where adminiſtration is granted, it is only *omnium bonorum*, without ſpeaking of chattels; yet hath the adminiſtrator intereſt in leaſes as well as moveables. On the other ſide, the *ſtat. de prerog. reg.* mentioning only forfeiture *de catallis* is clearly extended to moveables: ſo alſo in the writ of aſſize *De catallis quæ in eo capta fuerint*, and in the writ of

Cap. 28.

4 E. 3. c. 7. So the ſtat. 5. R. 2. ca. of Forfeiture. of goods by thoſe who goe beyond the Sea, Ca. 16. In all theſe goods are comprehended.

execution upon a ſtatute, there is on- the word *catalla*, and not *bona*; and in the caſe reported by *Kelway temp. Hen-* the ſeventh, it ſeemes. *bona & catalla* were taken for *Synonyma*, or all one. It doth not appeare that theſe ſtatutes and writs were alledged or conſidered of *temp. Edw.* 6. but in *Portmans* caſe the moſt of them were. 13. H. 7. Kelw. rep. 35. a.

If one will that his wife or any other ſhall have, or hold, or enjoy the moiety of his leaſe with his Executor. This imployeth not that the Executor have the other moiety as a legacy alſo, but otherwiſe as the Law caſts it upon him, no more than where the moiety of fee-ſimple land is deviſed to the younger ſon, this ſhall not make the elder ſon to have the other moiety otherwiſe than by deſcent, as betweene *Low* and *Carter* was conceived. But there being a Proviſo in the wives bequeſt, that if ſhe married from the houſe, then, &c. *Popham cap.* Juſtice, held, that if ſhe married at all, this was a marrying from the houſe, for ſhe was no longer widow of that houſe, though ſhe married with one of that kindred, and who had no other houſe, but would dwell in the bequeathed. Low & Cart. caſe Tr. 27. Elin b. reg.

CHAP.

Chap. XX.

Of the Executor of an Executor.

I Should be taxed of omiſſiō, if I ſhould not ſhew whether the things foreſpoken of Executors immediate, extend alſo to the mediate or more remote Executors. Aſſuredly, were I not by the bookes otherwiſe informed, I ſhould thinke it ſomewhat ſtrange, that the mediate Executor in the fourth, fifth, or further degree ſhould not by the rules of the Common Law, ſtand in like plight Executor to the firſt Teſtator, as the firſt and immediate Executor, as well as the heire, and aſſignee in the third or thirteenth degree is capable of all advantages in like ſort as the firſt and immediate heire, and aſſignee. And indeed we find both in the time of *Edward* the ſecond, and *Edward* the third, execution ſued out upon a judgment and ſtatute, by an Executor of an Executor, and why he might not as well maintaine an action of debt, &c. I ſee not. But

See Plow. 184. a debt. againſt the executor of an executor.

19 Ed. 2. and 24 Ed. 3. Fit. executor 87. & 103.

I

I must confesse, I finde both books to the contrary before any statute made in the point, and after an act of Parliament to enable them to bring actions, and to make them subject to actions, yet the statute speakes nothing of conferring upon them the testators goods. Now if they had title to them before that statute, and without the helpe of that statute, it is strange if they should not be suable for debts. But since that statute, and at this day where by a will a special trust is recommended to an executor, as to sell land, &c. this not performed in his life time, shall not be performable by his executor: contrarywise of an interest, as to take the profits of lands for certaine years towards payment of debts, and legacies: and where the stat. *temp. H.* 8. gives remedy to executors for recovery of rents of inheritance behind in the testators life, I doubt not but executors of executors are within the equity as well as within the stat. 9. *Ed.* 3. *cap.* 3. that the exec. who appeares at the grand distresse shall answer alone. Yet the stat. *Westmin.* 2. *cap.* 3. for executors, was taken not to extend to Executors of Executors. *Quod non est lex.* So as now in all cases except of

11 Ed. 3. & 13 Ed. 3 Fitzh. Exec. 78. 92. 25 Ed. 3. c. 5.

19 H. 8. 9. 10 4 El. Dy. 201 32 H. 8. cap. 37. So 32. H. 8. 28 leases And 32 H. 8 cap. 34 Conditions, and 13 El. cap. 5 & 27 El. cap. 4 Of fraudulant conveyances. 21 H. 8 cap. 15 for falsifying recoveries. 39. H. 8 45. 7. E. 3. 42.

special trust or authority, without the office of Executorship. The Executor of an Executor, how farre soever in degree remote, stands as to the points both of Being, Having, and Doing, in the same state and plight as the first and immediate Executor.

Chap. XXI.

Touching Administrators.

OF these also as standing in much affinity with Executors, it may be by some expected that I should have treated. But first my excuse is, that these of Executors only having growne to so great a bulke above expectation, I was unwilling to inlarge it further. Secondly, that which in the points of having and doing is before set forth, and shewed touching Executors, may be applyed to, and understood of Administrators though not what is spoken of being, and unbeing, or revocation of Executorships, and other circumstantial points.

Lastly, I may perhaps, if these find good acceptance, adde ere long that which

which appertaineth to administrators distinguished from executors, or wherein they stand in different state.

CHAP. XXII.

Considerations in conscience, touching payment of Debts, Legacies, and the preferring or respect of persons.

TO the advertisement what course Executors are to hold in their payments, I thought good to adde this in *foro conscientiæ*, That when as it shall stand in the Executors will and election to pay whom he will, and as he will, in respect of equality in the dignity and degree of the debts, all being for the purpose by the specialty, and none of record, and yet he hath not wherewith to pay or satisfie all; Here he may have three wayes or courses in his eye.

First, where there is equality in the honesty and conscience of the debts; there except in the ability of the parties to bare losse, the disproportion may otherwise occasion) me thinks it should be most honest and just to pay every one

1.

of this is taught by the law, which gives the *audita querela* for equal contribution in bearing of losse by them who stand in equal degree: so of legacies.

2. The poverty and inability of some, and the plenty of others, may in *foro conscientiæ* justifie the paying more to one, and suffering him to lose lesse (if any thing) than another. For if the widowes mite was a greater gift, so a greater losse than more out of abundance. Where charity finds or may finde place or neerenesse to place of giving, it may find greater motives of preserving from losse: so of legacies.

3. The nature of the debts, and so sometimes of legacies, may be so different, as thence may spring a just motive to disproportion payments, to pay more to one than another, rate for rate, and so to suffer one to lose more than another. One debt may perhaps be use for money, or at least money lent for use, another may be money freely lent. Another debt for land of inheritance bought; another debt for a lease, chattels or moveables, come to the Executor. The first merits

the

without any of these motives there is not quality held in payment, *Peccatur* (as I thinke) *in conscientiam*. But let every one stand or fall by, or to his owne, or to him who is greater than his conscience. This equality Saint *Paul* in another case recommends to the *Corinthians*. And *Solomon*, while ſt no inequality appeared in the point of right, ſhewed his diſpoſition to have made an equal diviſion of the childe between the mothers, who were joynt claymers and competitors for it.

2 Cor. 8. 14.

See more of conſcience *Doct.* and *Stud.*

Dr. J. M.
9/8/15

FINIS.